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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-446

HAMMOND LEAD PRODUCTS, INC., *Petitioner,*

v.

THE UNITED STATES (Ralph Valls, Party-in-Interest), *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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HAMMOND LEAD PRODUCTS, INC., *Petitioner,*

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THE UNITED STATES (Ralph Valls, Party-in-Interest), *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioner, Hammond Lead Products, Inc., petitions for a writ of certiorari to review the judgment rendered herein on April 22, 1971, by the United States Court of Customs and Patent Appeals.

OPINIONS BELOW

The opinion of the United States Court of Customs and Patent Appeals, reported at 58 C.C.P.A. ., C.A.D. 1017, 440 F.2d 1024, appears as Appendix A to this Petition. The two opinions of the United States Customs Court, reported at 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp. 460 and 61 Cust. Ct. 137, C.D. 3552, 289 F. Supp. 533, appear as Appendix B and C respectively.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals for which review is sought was entered on April 22, 1971. A Petition for Rehearing was denied on July 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1256.

QUESTION PRESENTED

Does the United States Customs Court possess jurisdiction pursuant to Section 516(b), Tariff Act of 1930, 19 U.S.C. § 1516(b),[1] to entertain a protest by an American manufacturer, producer, or wholesaler which complains of the failure of the Secretary of the Treasury to assess a countervailing duty pursuant to the mandate found in Section 303, Tariff Act of 1930, 19 U.S.C. § 1303?

STATUTORY PROVISIONS INVOLVED

The statutes involved are:

Item 473.52, TSUS (19 U.S.C. § 1202):

> Pigments (except pigments, in dry form, described in the foregoing provisions of this subpart):
>
> * * * *
>
> Containing Lead:
>
> * * * *
>
> Item 473.52 Litharge ..... 1.25¢ per lb.

Section 303, Tariff Act of 1930, 19 U.S.C. § 1303:

Countervailing duties

> Whenever any country, dependency, colony, province, or other political subdivision of govern-

[1] All references to the Tariff Act of 1930 refer to its provisions prior to its amendment by *The Customs Court Act of 1970*, P.L. 91-271, 84 Stat. 274, Approved June 2, 1970.

ment, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this chapter, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this chapter, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated. The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of such additional duties. June 17, 1930, c. 497, Title III § 303, 46 Stat. 687.

Section 516(b), Tariff Act of 1930, 19 U.S.C. § 1516(b):

Classification

(b) The Secretary of the Treasury shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification of, and the rate of duty, if any, imposed upon, designated imported merchandise of a class or kind manufactured, produced, or sold at whole-

sale by him. If such manufacturer, producer, or wholesaler believes that the proper rate of duty is not being assessed, he may file a complaint with the Secretary, setting forth a description of the merchandise, the classification, and the rate or rates of duty he believes proper, and the reasons for his belief. If the Secretary decides that the classification of, or rate of duty assessed upon, the merchandise is not correct, he shall notify the collectors as to the proper classification and rate of duty and shall so inform the complainant, and such rate of duty shall be assessed upon all such merchandise entered for consumption or withdrawn from warehouse for consumption after thirty days after the date such notice to the collectors is published in the weekly Treasury Decisions. If the Secretary decides that the classification and rate of duty are correct, he shall so inform the complainant. If dissatisfied with the decision of the Secretary, the complainant may file with the Secretary, not later than thirty days after the date of such decision, notice that he desires to protest the classification of, or rate of duty assessed upon, the merchandise. Upon receipt of such notice from the complainant, the Secretary shall cause publication to be made of his decision as to the proper classification and rate of duty and of the complainant's desire to protest, and shall thereafter furnish the complainant with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at the port of entry designated by the complainant in his notice of desire to protest, as will enable the complainant to protest the classification of, or rate of duty imposed upon, such merchandise in the liquidation of such an entry at such port. The Secretary shall direct the collector at such port to notify such complainant immediately when the first of such entries is liquidated. Within thirty days after the date of mailing to the com-

plainant of notice of such liquidation, the complainant may file with the collector at such port a protest in writing setting forth a description of the merchandise and the classification and rate of duty he believes proper. Notwithstanding such protest is filed, merchandise of the character covered by the published decision of the Secretary when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, rendered under the provisions of subsection (c) of this section, not in harmony with the published decision of the Secretary, shall be classified and the entries liquidated in accordance with such decision of the Secretary, and, except as otherwise provided in this chapter, the liquidations of such entries shall be final and conclusive upon all parties. If the protest of the complainant is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of such court decision, shall be subject to classification and assessment of duty in accordance with the final judicial decision on the complainant's protest, and the liquidation of entries covering such merchandise so entered or withdrawn shall be suspended until final disposition is made of such protest, whereupon such entries shall be liquidated, or if necessary, reliquidated in accordance with such final decision. June 17, 1930, c. 497, Title IV, 46 Stat. 735; June 25, 1938, c. 679, § 17(a), 52 Stat. 1084; June 25, 1948, c. 646, § 39, 62 Stat. 992.

STATEMENT OF THE CASE

Petitioner is a domestic manufacturer of simple lead products, the predominant one being litharge. Litharge is a lead oxide containing ninety-three percent lead metal and seven percent oxygen. Its fabrication is essentially one of furnacing refined lead and its primary uses are in lead storage batteries and in the chemical and pigment industries.

Throughout the 1960's Petitioner was active in efforts designed to convince the Treasury Department, and its agent the Bureau of Customs, that litharge exported from Mexico was the recipient of a bounty or grant and that a countervailing duty was required to be imposed pursuant to Section 303, Tariff Act of 1930, 19 U.S.C. § 1303. Section 303, which has been a part of our customs laws in substantially its present form since Section 5 of the Tariff Act of 1897, 30 Stat. 205, provides that all dutiable articles which receive a bounty or grant by a foreign government upon their manufacture, production, or export shall be met at our borders with an additional duty—countervailing duty—equal to the amount of the bounty or grant. This provision and its two operative terms, bounty and grant, have twice been subjected to analysis by this Court, *Downs* v. *United States,* 187 U.S. 496 (1903), and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), and on various occasions by the customs courts. *Energetic Worsted Corp.* v. *United States,* 51 Cust. Ct. 55, C.D. 2413, 224 F. Supp. 606 (1963), *rev'd,* 53 C.C.P.A. 36, C.A.D. 874 (1966); *Heathcoat Co.* v. *United States,* 34 C.C.P.A. 122, C.A.D. 354 (1947); *Robert E. Miller and Co.* v. *United States,* 34 C.C.P.A. 101, C.A.D. 349 (1946); *Balfour, Guthrie & Co.* v. *United States,* 31 C.C.P.A. 63, C.A.D. 249,

136 F.2d 1019 (1943); *V. Mueller & Co.* v. *United States,* 28 C.C.P.A. 249, C.A.D. 152, 115 F.2d 354 (1940); *F. W. Woolworth Co.* v. *United States,* 28 C.C.P.A. 20, C.A.D. 151, 115 F.2d 348 (1940); *Case and Co.* v. *United States,* 3 Cust. Ct. 310, C.D. 264 (1939); *Franklin Sugar Refining Co.* v. *United States,* 178 Fed. 743 (E. D. Pa. 1910); *United States* v. *Hill Bros. Co.,* 107 Fed. 107 (2d Cir., 1901).

Briefly stated, Petitioner maintained that the Mexican Government subsidized the Mexican litharge industry. Refined lead, the raw material in the manufacture of litharge, bears an acquisition cost to the litharge producer which generally amounts to nearly eighty percent of the total packaged selling price of litharge. Petitioner maintained that through an established formula the Mexican Government required the two smelters of refined lead in Mexico to sell their product domestically at a price substantially below the international price for refined lead. The result of this practice enabled the litharge manufacturer to export his product to the United States at prices noncompetitive with that quoted by producers of litharge in the United States.

Following repeated failures to obtain the imposition of a countervailing duty by the Treasury Department, Petitioner, on May 2, 1967, filed a complaint with the Secretary under Section 516(b), Tariff Act of 1930, 19 U.S.C. § 1516(b), claiming that litharge imported from Mexico should be classified under Section 303 and accordingly assessed with a countervailing duty. Section 516(b) details an administrative remedy culminating in the United States Customs Court whereby an American manufacturer, producer, or wholesaler may protest the classification and rate of

duty imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. Pursuant to Section 516(b), the Commissioner of Customs notified Petitioner on May 5, 1967, that the classification and rate of duty on litharge were correct and that countervailing duties were inapplicable. Thereafter, on May 9, 1967, Petitioner notified the Secretary of the Treasury that he intended to protest the classification and rate of duty assessed upon litharge imported from Mexico. The Secretary, pursuant to the Section, published its decision as to the classication and rate of duty and Petitioner's desire to protest in T.D. 67-142. On August 21, 1967, Petitioner was notified by the District Director of Customs, Laredo, Texas, of the entry on August 10, 1967, of 100,200 pounds of litharge and of its liquidation on August 21, 1967. Thereafter, on September 18, 1967, Petitioner protested the classification and rate of duty on the referenced liquidation. The protest was forwarded to the United States Customs Court on October 30, 1967, and docketed as Protest No. 67/77548.

United States Customs Court

On March 28, 1968 and April 12, 1968, the United States and the Party-in-Interest, respectively, filed motions to dismiss the docketed protest for lack of subject matter jurisdiction in the United States Customs Court. The United States pointed out that Section 516(b) limits American manufacturer's protests to the questions of the classification and/or rate of duty imposed upon the designated merchandise. The United States argued that the only rate of duty applicable to litharge was Item 473.52, T.S.U.S., and an additional

duty in the nature of a countervailing duty only affected the total amount of duty assessed, not its rate. The United States cited *E. C. Miller Cedar Lumber Co.* v. *United States,* 24 C.C.P.A. 272, T.D. 48701, 86 F2d 429 (1936), for the proposition that the amount of duty was an issue distinct from the question of rate of duty, and was outside the scope of Section 516(b).

Party-in-Interest repeated the argument of the United States that countervailing duties referred to the amount of duty to be assessed, and was outside Section 516(b) under the rule of *E. C. Miller, supra.* Party-in-Interest further argued that negative determinations of the Secretary of the Treasury were not reviewable under *Mills & Gibb* v. *United States,* 8 Ct. Cust. Appls. 31, T.D. 37164 (1917), and the alleged inconsistency between the implementing regulations issued under Section 303, 19 C.F.R. § 16.24, and Section 516(b) evidenced that countervailing duty protests were outside the reviewing statute.

Following an oral argument on the jurisdictional question, the United States Customs Court, First Division, on September 11, 1968, unanimously denied both motions to dismiss. 61 Cust. Ct. 137, C.D. 3552, 289 F. Supp. 533 (Appendix C). The court held that *E. C. Miller, supra,* was inapplicable to the issue presently before it. *E. C. Miller,* the court held, pointed out that the total amount of duty assessed is the product of the rate of duty times the quantum of merchandise (also times the value where the duty is ad valorem). Rate of duty, as used in Section 516(b), does not include questions concerning the quantum of merchandise and its indirect effect on the amount of duty to be assessed. The court held that countervailing

duties represented a rate to be applied against a specified quantity, and the rule of *E. C. Miller* had no application to the subject protest. The court held that *Mills & Gibb* v. *United States, supra,* dealt with a statute other than Section 516(b), a statute which limited review to decisions of a collector. Thus there was no jurisdiction when the protest was directed to an area where only the Secretary of the Treasury, and not the collector, possessed decision-making authority. *Mills & Gibb* was inapplicable, of course, since Section 516(b) permitted review of decisions of the Secretary of the Treasury. The court also failed to find any inconsistency between the administrative regulations implementing Section 303 and Section 516(b), and dismissed as "meaningless", in any event, the effect of such an inconsistency upon the congressional remedy found in Section 516(b).

The court held that *Bradford Co. and U.S.* v. *American Lithographic Co.,* 12 Ct. Cust. Appls. 318, T.D. 40318 (1924), was "determinative of the jurisdictional issue." In *Bradford,* an American manufacturer protested under Section 516(b), Tariff Act of 1922,[2] that certain merchandise should be assessed with an additional duty equal to ten percent of its appraised value, because such merchandise was not marked, stamped, branded or labeled, so as to indicate the country of origin as required by Section 304(a), Tariff Act of 1922—the predecessor to Section 304, Tariff Act of 1930. The Appellants in *Bradford* contended that Section 304(a) did not involve issues of classification or rate of duty, relying upon argu-

[2] As far as the present issue is concerned, Section 516(b), Tariff Act of 1922, was essentially similar to Section 516(b), Tariff Act of 1930.

ments remarkably similar to Respondents here. The Court of Customs Appeals, in *Bradford,* defined classification in the following fashion:

> Classification of imported merchandise is the process or act of grouping, or arranging merchandise into classes; it is a process which may be based upon the use to which the article has been dedicated, its commercial designation, its similarity to other merchandise, the condition in which it is imported, and other equally important considerations, the purpose of which is to determine what provisions of the tariff laws are applicable thereto. 12 Ct. Cust. Appls. at 323.

Bradford, in referring to rate of duty, commented that "We think that a proper interpretation of the phrase, 'rate of duty,' as it is used in section 516(b), *supra,* means the amount of duty assessed against imported merchandise, resulting in the first instance, from the classification thereof." 12 Ct. Cust. Appls. at 323.

The Customs Court held that Section 304(a), like Section 303, required the imposition of an additional duty, added upon the existing statutory duty, should a specific condition exist. In Section 304(a), the condition is the improper marking of the goods with the country of origin; in Section 303, the condition includes the bestowal of a bounty or grant by a foreign government. Determination of the applicability of the condition, and, therefore, the applicability of the particular Section, is classification. The additional duties to be imposed upon an affirmative finding of the existence of the requisite condition is a rate of duty, a monetary assessment commanded by Congress with the same certitude as the rates contained in the Tariff Schedules.

The court also referred to *North American Cement Corp.* v. *Anderson,* 284 F.2d 591 (D.C. Cir. 1960), where the District of Columbia Circuit Court held that Section 516(b) was the proper vehicle for an American manufacturer to challenge the failure of the Secretary of the Treasury to find that cement imported from Norway was being sold in this country at less than fair value, and the resulting failure to impose a special dumping duty as required by the Anti-dumping Act of 1921. Finally, the court was impressed with *Feltex Corp.* v. *Dutchess Hat Works,* 21 C.C.P.A. 463, T.D. 46597, 71 F.2d 322 (1934), for the rule that American manufacturers under Section 516(b) may contest classification and rate of duty of imported merchandise to the same extent as importers might do under Section 514, providing for protests by importers against decisions of the collector. This pronouncement bore particular relevance in light of the fact that importers have always been deemed entitled to contest in the customs courts the assessment of countervailing duties.[8]

Following the denial of the motions to dismiss, trial on the merits was held on January 29, 1969. By way of a post-trial brief on the merits, the United States again repeated its contentions of lack of jurisdiction in the United States Customs Court. On November 7, 1969, the United States Customs Court, First Division, unanimously rejected the repeated jurisdictional argument of the United States, and held that the fiscal activities of the Mexican Government with respect to refined lead and litharge amounted to the bestowal of a bounty or grant on the production and exportation of litharge, 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp.

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[8] *See,* decisions cited on pages 6-7, *supra.*

460 (Appendix B). The court directed the reliquidation of the entry by adding, pursuant to Section 303, an additional duty equal to the amount, as found by the Secretary of the Treasury, of the bounty or grant bestowed by the Mexican Government. On January 5, 1970, both the United States and the Party-in-Interest petitioned for review to the United States Court of Customs and Patent Appeals.

United States Court of Customs and Patent Appeals

On appeal, the United States confined itself to the decision of the customs court on the merits, and did not refer to the jurisdictional arguments which it had raised below. Party-in-Interest, on the other hand, sought review on both the jurisdictional question and on the merits. Party-in-Interest essentially repeated the same contention which it had previously made; that is, that the additional duty called for by Section 303 was not a rate of duty, but only referred to the amount of duty, citing *E. C. Miller Cedar Lumber Co.* v. *United States, supra.* Party-in-Interest also sought to limit *Bradford Co. and U. S.* v. *American Lithographic Co., supra,* to its own facts, and not as a precedent for the rule that classification is the determination of what provisions of the customs laws apply to a specific entry.

On April 22, 1971, the United States Court of Customs and Patent Appeals held that the United States Customs Court lacked jurisdiction over the protest and, therefore, reversed the lower court's decision and judgment.[4] 58 C.C.P.A. ——, C.A.D. 1017, 440 F.2d 1024 (Appendix A) The ratio decidendi of the appellate court below was utterly unique from any

[4] Two of the five judges dissented, holding that they would affirm the decision below not only as to jurisdiction but also on the merits.

of the jurisdictional arguments previously submitted by the several parties. The court recognized that Section 516(b) was expressly limited to matters of classification and/or rate of duty, whereas Section 514, Tariff Act of 1930, the provision enabling protests by importers, permitted review of "all decisions of the collector . . . as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury) . . . ." The court concluded that there must be some customs exactions within Section 514 and outside of Section 516(b). The court concluded that "customs penalties, as a class, are 'exactions' included in Section 514 and left out of Section 516(b)" —citing no authority. The syllogism was completed by the court's finding that a countervailing duty called for by Section 303 was a penalty—citing no authority—and, therefore, outside the scope of Section 516(b).

The appellate court below catapulted the otherwise insuperable logic of *Bradford Co. and U. S.* v. *American Lithographic Co., supra,* "on the hypothesis that the ten percent marking duty there involved was not regarded as penal." The court sought to delimit the meaning of "classification" to the "physical characteristics of the imports"—a tacit overruling of *Bradford's* definition of classification which has been uniformly relied upon in subsequent customs decisions. *Diamond Match Co.* v. *United States,* 45 Cust. Ct. 198, C.D. 2223, 181 F. Supp. 952 (1960); *Star-Kist Foods, Inc.* v. *United States,* 37 Cust Ct. 171, C.D. 1819, 150 F. Supp. 737 (1957); *E. C Miller Cedar Lumber Co.* v. *United States, supra.* A petition for rehearing was denied by the appellate court on July 1, 1971.[5]

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[5] Judge Almond would have granted the petition.

REASONS FOR GRANTING THE WRIT

"This is a novel question, so far as we know, and a momentous one . . . ." Although this description was made as a prefatory comment to the appellate decision below, it serves as a most suitable means for introducing this petition. The effect of the decision below is to foreclose judicial review to American industry of decisions of the Secretary of the Treasury as to the applicability of countervailing duties under Section 303, Tariff Act of 1930. Furthermore, both the logic and the dicta of the decision below require its extension beyond the countervailing duty area, and its presence will be certainly apparent in antidumping litigation. 19 U.S.C. § 160 *et seq.*

With the modern trend "toward enlargement of the class of people who may protest administrative action," *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970), particular scrutiny must be focused upon a decision which precludes review to a class as large as the "American manufacturer, producer or wholesaler." This is particularly true where the court denies review despite a lack of congressional expression in favor of foreclosure [6] and in the very face of a statute expressly extending review to the class foreclosed. In 1922 Congress enacted a statute permitting American manufacturers "the right of protest against the rate or amount of duty as being too low" and allowing them to be "heard upon matters of value and classification of imported merchandise directly affecting their in-

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[6] When Congress has desired to preclude Section 516(b) review from a particular rate-making function, it has done so. *See*, Section 2 of the Trade Agreement Act of 1934, 48 Stat. 944, excluding Section 516(b) from commodities subject to foreign trade agreements.

terests."[7] Since 1897, Congress has always provided a remedy to protect American industry from the unfair effects of foreign export subsidies by requiring an additional duty to countervail the amount of the subsidy. It is submitted that the decision below which carves out countervailing duty matters from Section 516(b) is repugnant to the very function of Section 516(b) which is

> . . . to extend to the American manufacturer, producer, or wholesaler the right to protest a classification of imported merchandise of a class and kind manufactured, produced, or sold at wholesale by him, and the rate of duty assessed thereon, if in his opinion such classification is wrong and the rate of duty assessed improper, because of his interest and concern in preventing unlawful competition in the markets of the United States by foreign producers of foreign products, resulting in injury to his business. *Bradford Co. and U. S.* v. *American Lithographic Co., supra,* at 324.

It is difficult to conceive of an area more relevant to the prevention of "unlawful competition in the markets of the United States by foreign producers of foreign products" than that of countervailing duties offsetting the effects of foreign subsidies. But the court below has found such not to be the case.

The decision below for which review is sought is one of national importance, directly affecting the ability of American industry to protect itself from unfair trade practices. The importance of the question presented, the novelty of the issue, and the sparsity

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[7] H. Rep. No. 248, Part I, 67th Cong., 1st Sess. (1921), p. 26.

of authority relied upon by the court below are sufficient reasons to warrant review by this Court. In addition, the inability of the decision below to stand on its own rationale, its direct inconsistency with a prior decision of the United States Court of Appeals for the District of Columbia Circuit, and its indirect inconsistency with two prior decisions of this Court render this petition unusually ripe for exercise of this Court's judicial discretion to grant review.

A. The Rationale of the Court Below Is Without Judicial Support

Section 516(b) is an unambiguous grant of judicial review to American manufacturers, producers and wholesalers of decisions of the Secretary of the Treasury as to the classification or rate of duty of imported merchandise of a class or kind manufactured, produced, or sold at wholesale by them. Petitioner has contended that litharge imported from Mexico should be subjected to a countervailing duty under Section 303, and the Secretary of the Treasury has ruled to the contrary. T.D. 67-142. The court below in denying jurisdiction of Petitioner's protest has ruled that a countervailing duty is not a rate of duty under Section 516(b) and that the determination of the application of Section 303 is not classification under Section 516(b).

In concluding that a countervailing duty is not a rate of duty, the court below utilized the following syllogistic approach. Section 514, Tariff Act of 1930, permits review by importers of decisions of the collector "as to the rate and amount of duties chargeable, and as to all exactions of whatever character . . . ." There must be some exactions, other than rate of duty matters, within Section 514 and outside of Section

516(b). Such an exaction is a penalty, and a countervailing duty is penal in nature. The court below neglected to offer any support for the conclusion that a countervailing duty is a penal exaction.

Section 303 calls for an additional duty, not a penalty,[8] to be assessed upon dutiable articles which receive a bounty or grant from a foreign country upon their production, manufacture, or export. The additional duty is to be in the same amount as the foreign bounty or grant. It is evident that the additional duty is inextricably linked to the normal duty on the article. In the first place, countervailing duties are inapplicable to duty-free articles, thus demonstrating that Congress does not consider foreign bounties as reprehensible per se. Secondly, the additional duty is to be in the same amount as the bounty, in other words, it is to offset or countervail the bounty. Thus, the countervailing duty is no more penal than all customs duties, since its function is merely to restore the protective efficacy of the ordinary duty to the extent, and only to the extent, to which it has been eroded by a foreign bounty.

> When export bounties . . . either direct or indirect, are paid upon goods, such bounties neutralize more or less the duties that may be charged upon their importation into other countries and the protection thereby accorded. To reestablish the original amount of protection, the importing country may provide that articles upon which export bounties are paid a protective surtax shall be charged. Such a surtax is known as a countervailing duty. U. S. Tariff Commission, *Dictionary of Tariff Information* (1924), p. 205.

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[8] Congress is not reluctant to label a customs assessment as a penalty, *see*, 19 U.S.C. §§ 1304(e), 1341(b), 1445, 1453, 1454, 1460, 1464, 1497, 1510, 1520(a)(3), 1581, 1584, 1592, 1618.

There is simply no support for the proposition that a countervailing duty is a penal exaction.[9] The court's dicta evidences a feeling that a countervailing duty is a non-judicial matter, an area in which a court should not interfere with administrative decision-making. But, in truth, the customs courts have a long history of litigating countervailing duty matters, and as recently as 1966 overturned the position of the Treasury Department. *Energetic Worsted Corp.* v. *United States,* 53 C.C.P.A. 36, C.A.D. 874.

Although the court below deals somewhat with the issue of whether a countervailing duty is a rate of duty, it utterly ignored the question of whether the application or non-application of Section 303 was classification under Section 516(b). *Bradford Co. and U. S.* v. *American Lithographic Co., supra,* defined classification as

> . . . the process or act of grouping, or arranging merchandise into classes; it is a process which may be based upon the use to which the article has been dedicated, its commercial description, its similarity to other merchandise, the condition in which it is imported, and other equally important considerations, *the purpose of which is to determine what provisions of the tariff laws are applicable thereto.* (Emphasis added). 12 Ct. Cust. Appls. at 323.

For over thirty years this statement has represented the landmark definition for application of Section 516(b). Surely, determination of the application of

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[9] Section 618, Tariff Act of 1930, 19 U.S.C. § 1618, permits the remission of penalties by the Secretary of the Treasury. There is no known case where an importer assessed with a countervailing duty has ever considered such a duty subject to possible remission as a penalty.

Section 303—the existence of a foreign bounty or grant —falls within this rule. The court below assumed that classification was not present as Section 303 "relates to something apart from the physical characteristics of the imports." Of course, such a narrow view was expressly rejected by *Bradford,* and its imposition by the court below was arbitrary, without foundation, and contrary to the intent of Congress.

B. The Decision Below Conflicts With North American Cement Corporation v. Anderson, 284 F.2d 591 (D.C. Cir. 1960)

The issue before the courts below was the question of whether the failure of the Secretary of the Treasury to assess a countervailing duty was properly reviewable under Section 516(b). As stated previously, this is a novel question, so far as Section 303 is concerned. However, other authority does exist on the somewhat larger question, although directly on point, of the reviewability under Section 516(b) of the failure of the Secretary of the Treasury to assess additional duties—duties in excess of the rates found in the Tariff Schedules. On the one hand, there are those decisions under Section 304, the marking statute. These decisions, emanating from the customs courts, establish that the questions of whether goods are properly marked with the country of origin and the resulting additional duty of ten percent of its appraised value for improper marking constitute matters of classification and rate of duty under Section 516(b). *Bradford Co. and U. S.* v. *American Lithographic Co., supra; Diamond Match Co.* v. *United States, supra*

Another additional duty is the dumping duty found in the Antidumping Act of 1921. 19 U.S.C. § 160 *et seq.* This Act is designed to prevent goods from being

exported to the United States at a sales price below that which the goods are sold for in the country of origin. If the Secretary of the Treasury finds that such a condition exists, and the United States Tariff Commission determines that such sales injure or are likely to injure an American industry, then the Secretary is directed to impose a special duty equal to the selling price differential. The similarity between this additional duty and a countervailing duty is readily apparent. The court below, in fact, volunteered that the "dumping duty . . . falls in the same category as the foregoing, as a special duty, but it seems clear that, whether or not penal, the roles assigned to the Secretary of the Treasury and the Tariff Commission are such that bypassing [10] them in a 516(b) proceeding is out of contemplation."

In *North American Cement Corporation* v. *Anderson,* 284 F.2d 591 (D.C. Cir. 1960), this precise issue of the reviewability of dumping determinations was before the court. American cement manufacturers sought the Secretary of the Treasury to determine if cement imported from Norway was being sold in this country at less than fair value. Upon a negative determination by the Secretary, a cement manufacturer brought suit for declaratory and injunctive relief against the Secretary and the Commissioner of Customs. Faced with 28 U.S.C. § 1340 which excepted from the jurisdiction of the district courts "matters within the jurisdiction of the Customs Court," the

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[10] The decision below repeatedly echoes the thought that Petitioner is "bypassing" the Secretary of the Treasury. But Section 516(b) is only instituted after a determination by the Secretary, so the Secretary is not bypassed. Petitioner only seeks review of a decision of the Secretary.

D.C. Circuit held that Section 516(b) provided a means of redress to the American manufacturer. *North American Cement Corporation* is totally irreconcilable with the decision below. This conflict of authority on an issue of such expansive import should be settled by this Court.

C. The Rationale Utilized by the Court Below To Support Its Decision Conflicts With Downs v. United States, 187 U.S. 496 (1903), and Nicholas & Co. v. United States, 249 U.S. 34 (1919)

As shown heretofore, the decision of the court below was dependent upon the conclusion that countervailing duties were penal exactions and not protective duties. Such a conclusion is entirely novel, and not only is it expressly refuted by the language of the statute itself, it also runs contrary to the analyses of countervailing duties made by this Court on the two occasions in which the statute has been before it. *Downs* v. *United States,* 187 U.S. 496 (1903); *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919). In both of these decisions, this Court read the statute in a protective vein, as a statute designed to equalize the effects of bounties on imports into our country. In *Nicholas,* the United States Court of Customs Appeals found that the "statute interprets itself as a member of an act calculated to maintain an accorded protection, incidental or otherwise, as against payments or grants of any kind by foreign powers, *resulting* (sic) in an equalization thereof to any extent directly or indirectly." 7 Ct. Cust. Appls. 97, 106, T.D. 36426 (1916).

On appeal, this Court affirmed stating in a similar tone that

> The statute was addressed to a condition, and its words must be considered as intending to define it,

> and all of them—"grant" as well as "bounty"—must be given effect. If the word "bounty" has a limited sense, the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession,—the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise," a countervailing duty is required. . . . 249 U.S. at 39.

The decision below constitutes authority for the proposition that countervailing duties are penal exactions and not custom duties. This concept is the sine qua non for the result reached. However, such a rule is utterly novel, and specifically inconsistent with the prior pronouncements of this Court.

CONCLUSION

In applying the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, this Court has stated that there is no presumption against review of administrative action and in favor of administrative absolutism. *Data Processing Service* v. *Camp, supra; Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967). Over twenty years prior to that Act, Congress recognized that American industry should be permitted to participate in the enforcement of customs laws which were largely enacted for their protection. And of all provisions in the law of customs it is difficult to imagine anyone more oriented toward the protection of American industry than the countervailing duty aimed at offsetting the pernicious consequences of foreign subsidies.

Yet the decision below states that countervailing duties are a matter solely delegated to administrative

discretion. The rationale is unique, based on assumption, and not law. It is submitted that such a decision with so great an effect upon domestic industry's self-protection in the complex arena of world trade should be dealt with by our nation's highest Court. This is especially true where this significant holding lacks any judicial precedent as support for its rationale, does not demonstrate a legislative design toward precluding review, conflicts with all judicial authority on point, both in the customs courts and in conventional federal courts, and casts doubt on previous pronouncements of this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Thursday, July 1, 1971

Present: Judge Rich, Judge Almond, Judge Baldwin, Judge Lane; Judge Nichols, United States Court of Claims; Judge Landis and Judge Re, United States Customs Court.

Petition for Rehearing

Customs Appeal

No. 5392-5393

UNITED STATES (RALPH VALLS, Party-in-Interest)

v.

HAMMOND LEAD PRODUCTS, INC.

Petition for rehearing denied. Judge Almond would grant the petition.

Judge Nichols participated in the Petition for Rehearing in Customs Appeal No. 5392-5393, but took no part in the consideration of or decision on the other cases in which opinions or other orders have been filed.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

October Term, 1970

Customs Appeal Nos. 5392, 5393

THE UNITED STATES (RALPH VALLS, Party-in-Interest),
Appellants,

v.

HAMMOND LEAD PRODUCTS, INC., *Appellee.*

April 22, 1971

NICHOLS, *Judge.*

This is an appeal from a decision and judgment of the United States Customs Court, First Division, 63 Cust. Ct. 516, C.D. 3915 (1969), sustaining the protest of an American manufacturer, Hammond Lead Products, Inc., appellee, and ordering reliquidation of entry.

On May 2, 1967, appellee filed a complaint asserting that litharge, item 473.52 of the Tariff Schedules of the United States (TSUS), imported from Mexico, was the recipient of a bounty or grant from the Mexican government, and, consequently, a countervailing duty was required to be imposed under the mandate of the Tariff Act of 1930, section 303, 19 U.S.C. § 1303. The Commissioner of Customs, acting for the Secretary of the Treasury, notified appellee that in his view the classification and rate of duty on litharge were correct and that countervailing duties were not applicable. Thereupon appellee protested pursuant to the Tariff Act of 1930, section 516 (b), 19 U.S.C. § 1516 (b), the classification and rate of duty assessed upon such litharge, which protest was duly

docketed in the Customs Court. Appellants moved to dismiss the protest on the ground that the court below lacked jurisdiction of the subject matter to entertain an American manufacturer's protest under section 516 (b) which complained that the Secretary of the Treasury failed to invoke a countervailing duty under the mandate of section 303. Following the filing of written briefs and oral argument, the Customs Court denied the motions of both appellants, 61 Cust. Ct. 137, C.D. 3552 (1968). Trial on the merits followed, and the Division unanimously sustained appellee's protest in the other decision cited.

Appellant United States is before this court seeking review and reversal of the Customs Court on the merits, while appellant Party-in-Interest seeks review of the decision below on both the jurisdictional aspect and on the merits.

The statutes involved are:

Item 473.52, TSUS:

> Pigments (except pigments, in dry form, described in the foregoing provisions of this subpart):
>
> * * * * * *
>
> Containing lead:
>
> * * * * * *
>
> Item 473.52 Litharge ..... 1.25¢ per lb.

Tariff Act of 1930, Section 303, 19 U. S. C. 1303:

> *Countervailing duties.*
>
> Whenever any country, dependency, colony, province, or other politial subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other

political subdivison of government, and such article or merchandise is dutiable under the provisions of this chapter, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this chapter, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated. The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Tariff Act of 1930, Section 516 (b), 19 U.S.C. § 1516 (b):

(b) *Classification.*

The Secretary of the Treasury shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification of, and the rate of duty, if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the proper rate of duty is not being assessed, he may file a complaint with the Secretary, setting forth a description of the merchandise, the classification, and the rate or rates of duty he believes proper, and the reasons for his belief. If the Secretary decides

that the classification of, or rate of duty assessed upon, the merchandise is not correct, he shall notify the collectors as to the proper classification and rate of duty and shall so inform the complainant, and such rate of duty shall be assessed upon all such merchandise entered for consumption or withdrawn from warehouse for consumption after thirty days after the date such notice to the collectors is published in the weekly Treasury Decisions. If the Secretary decides that the classification and rate of duty are correct, he shall so inform the complainant. If dissatisfied with the decision of the Secretary, the complainant may file with the Secretary, not later than thirty days after the date of such decision, notice that he desires to protest the classification of, or rate of duty assessed upon, the merchandise. Upon receipt of such notice from the complainant, the Secretary shall cause publication to be made of his decision as to the proper classification and rate of duty and of the complainant's desire to protest, and shall thereafter furnish the complainant with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at the port of entry designated by the complainant in his notice of desire to protest, as will enable the complainant to protest the classification of, or rate of duty imposed upon, such merchandise in the liquidation of such entry at such port. The Secretary shall direct the collector at such port to notify such complainant immediately when the first of such entries is liquidated. Within thirty days after the date of mailing to the complainant of notice of such liquidation, the complainant may file with the collector at such port a protest in writing setting forth a description of the merchandise and the classification and rate of duty he believes proper. Notwithstanding such protest is filed, merchandise of the character

covered by the published decison of the Secretary, when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Apeals, rendered under the provisions of subsection (c) of this section, not in harmony with the published decision of the Secretary, shall be classified and the entries liquidated in accordance with such decision of the Secretary, and except as otherwise provided in this chapter, the liquidations of such entries shall be final and conclusive upon all parties. If the protest of the complainant is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption after the date of publication of such court decision, shall be subject to classification and assessment of duty in accordance with the final judicial decision on the complainant's protest, and the liquidation of entries covering such merchandise so entered or withdrawn shall be suspended until final disposition is made of such protest, whereupon such entries shall be liquidated, or if necessary, reliquidated in accordance with such final decision.

We conclude that the Customs Court lacked jurisdiction and reverse on that ground. Those interested in the facts and record in detail can find them stated in the decisions below. In view of our conclusion, a summary will suffice here. Briefly, then, Mexico has had in recent years an exportable surplus of refined lead, and has therefore figured in the world lead market. Lead is traded on the London Metal Exchange and has a world price established there daily. Litharge is a lead oxide, made from refined lead

by a simple process, and containing 93% primary lead metal. Its main use is in storage batteries, and in the chemical and paint industries. In 1954, as we take judicial notice, Mexico devalued the peso from 8.65 to 12.50 per dollar. In connection therewith she increased existing export taxes on lead for the purpose of maintaining domestic supplies and keeping down domestic prices. Thereafter refined lead remained available or was made available to domestic users approximately at the world price adjusted less the export tax, which was of course not applicable. Sales of lead for export subject to tax were at the world price. The export tax was, however, not applied thenceforward to exports of litharge and consequently, Mexican litharge producers could offer litharge in other countries with a price predicated on the domestic lead price unenhanced by the export tax. This exemption enabled Mexican litharge to enjoy in world markets a more favorable price in relation to lead, Mexican and other, than would have been normal. Exports of litharge to the United States rapidly increased, reaching a level which injured the appellee company in its business. The theory of the trial court was that an indirect bounty or grant on export of litharge existed, within the meaning of section 303, not just because of its exemption from export tax, but also from what the court viewed as the supply of lead to the Mexican litharge manufacturers at an artificially low price.

As to the jurisdictional issue, the question of course is whether the Congress intended that the countervailing duty provison of the Tariff Act of 1930, section 303, *supra,* is to work in harness with the American Manufacturer's Protest, section 516 (b), *supra,* so that an American manufacturer can obtain the assessment of countervailing duties by reason of the action of a foreign government, without the acquiescence of the Treasury Department in the assessment. This is a novel question, so far as we know, and a

momentous one, fraught with consequences as to the control of the executive branch over the foreign relations and foreign policy of the United States.

The text of section 516 (b) indicates plainly in two ways that some issues are excluded from the American Manufacturer's Protest that the importer could litigate if he were the one aggrieved. First, the Secretary is to furnish him on demand "*the* classification of, and *the* rate of duty, if any * * *" (emphasis supplied) raising a doubt right away as to whether the provison has application to special and additional duties, above and beyond the regular ones normally applicable to products of all countries with which we have most favored nation commitments. When such exactions are involved, the Secretary could not respond with *the* rate of duty but with several, depending on circumstances. Next, section 516 (b) does not embody the sweeping language of section 514 which makes reviewable at the importer's instance "all exactions of whatever character". Thus, there must be some customs exactions, of some character, not litigable under 516 (b).

Again, the text of section 303 requires the Secretary to determine the "net amount of each such bounty or grant." It may appear somewhat absurd to sever determination of the existence of a bounty or grant from the amount of it, but this is the result if the court may determine that a bounty or grant was paid, without the Secretary's concurrence. The trial court would have remanded after determining there was a bounty or a grant, to let the Secretary determine its amount, which the statute expressly says he must do. Could the Secretary now determine that the "net amount" was one peppercorn per ton? If the court does not know how to calculate the bounty or grant, how does it know there was one? A clear separation, as between "entitlement" and "damages" in a contract dispute, just does not exist in this class of issue. Thus in *Energetic Worsted Corp.* v. *United States*, 53 CCPA 37,

C.A.D. 874 (1966), this court reversed, killing the controversy, because the Treasury determination as to the amount of the alleged bounty was not adequately substantiated.

It would appear that customs penalties, as a class, are "exactions" included in section 514 and left out of section 516 (b). This is the most natural explanation of the language discrepancy. It would be obnoxious on several grounds for domestic industries to be given a litigable interest in the assessment of penalties upon importers, and moreover, against the Secretary's best judgment it would be futile, because he could always mitigate or remit the penalties under section 618, Tariff Act of 1930, 19 U.S.C. § 1618.

There is a line of cases where the courts have reviewed the Secretary's determination that a bounty was bestowed by a foreign government and held the imposition of countervailing duty justified thereby. *F. W. Woolworth Co.* v. *United States,* 28 CCPA 239, 115 F. 2d 348 (1940); *V. Mueller & Co.* v. *United States,* 28 CCPA 249, 115 F. 2d 354 (1940); *Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97 (1916), *aff'd* 249 U.S. 34 (1919); *Downs* v. *United States,* 113 F. 144 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903). But in each of these cases, the protest was being made by an importer under section 514 or its predecessors, not by "American manufacturers, producers or wholesalers" under section 516 (b). An importer, of course, would never have occasion to make a challenge of the kind made here, that the countervailing duty should have been levied, though in fact it was not.

We further hold that section 303 is penal in character. We have had other instances in customs law of exactions held by courts to be penal, though designated by Congress as "additional duties." The best example is *Helwig* v. *United States,* 188 U.S. 605 (1903). This involved the "undervaluation duty" imposed for any deficiency in the en-

tered value of imported merchandise as compared to the value as appraised by Customs officials. The absence of intent to defraud or mislead, indeed the importer's entire innocence, was no defense. This came down to comparatively recent days as part of section 489 as originally enacted in the 1930 Act. The Supreme Court viewed the penal character of it as enhanced, not mitigated, by its indifference to the importer's righteous intent. By analyzing the financial consequences of the so-called duty the Court showed that its purpose was not to raise revenue but to halt practices Congress regarded as objectionable by harsh moretary exactions out of all proportion to the regular duties involved. Subsequent to the importation, but prior to tne decison, the Congress amended the provision to declare it should not be regarded as penal, but the Court refused to give this retroactive effect.

The D. C. Circuit followed *Helwig* in *Cotonificio Bustese S.A.* v. *Morgenthau,* 74 App. D.C. 13, 121 F. 2d 884 (1941). The plaintiff had incurred the additional ten percent duty under section 304, Tariff Act of 1930, 19 U.S.C. § 1304, for an importation not properly marked to show country of origin. The court mandamused Secretary Morgenthau to require him to consider whether he should exercise in the case the discretionary authority he had under section 618, to mitigate or remit penalties. Repeating the *Helwig* history, Congress amended the marking law to declare, as it now does, that it should not be regarded as penal and should not be remitted.

Section 303 differs from the exactions above considered in that the offending party is considered to be a foreign government, not a producer or importer. We do not regard this as a significant distinction. As in the case of the other exactions above discussed, the purpose is not to raise revenue but to halt a practice deemed objectionable by a harsh monetary exaction. The Congress has never declared it is not penal, unlike the other cases, and this

would be consistent with a desire on its part that section 303 exactions should be under the full control of the Secretary of the Treasury. We note that in the case of the countervailing duty assessment, no injury to a domestic industry need be shown. This fact appears inconsistent with any theory that the countervailing duty is merely protective in character.

Bradford Co. v. *American Lithographic Co.*, 12 Ct. Cust. Appls. 318, T. D. 40318 (1924), so heavily relied on by the court below, is apparently inconsistent with the view here expressed, and is best explained on the hypothesis that the ten percent marking duty there involved was not regarded as penal. Our predecessor court held that an American manufacturer could use section 516 (b) procedure to protest a failure to assess the ten percent marking duties under section 304. *Bradford* was cited to the D.C. Circuit in *Cotonificio Bustese*, but a footnote shows the D.C. Circuit was apparently under the impression that *Bradford* was decided under sections 514 and 515 and therefore did not fully appreciate the logical conflict between its decision and that of this court's predecessor.

The duty under section 304 for not marking relates to a physical characteristic of the merchandise, observable on its examination by Customs officers, although an importer who pays the duty cannot thereby obtain the right to import without marking. The court reasoned that the discovery by Customs officers that the merchandise was not properly marked was "classification." It cannot be said that the ascertainment that a retaliatory duty is due is likewise "classification", as it relates to something apart from the physical characteristics of the imports. We think that the *stare decisis* authority of the Bradford case should be restricted to special duties allegedly due under section 304, and special duty cases under other laws should be deemed ***res integra.***

The dumping duty under 19 U.S.C. § 160 and ff., falls in the same category as the foregoing, as a special duty, but it seems clear that, whether or not penal, the roles assigned to the Secretary of the Treasury and the Tariff Commission are such that bypassing them in a 516 (b) p. ceeding is out of contemplation. *But, cf., North American Cement Corp.* v. *Anderson*, 284 F. 2d 591 (D.C. Cir. 1960). The provision in section 338, Tariff Act of 1930, 19 U.S.C. § 1338, for retaliatory duties or embargoes in cases of foreign discrimination against American products or commerce appear to be clearly penal, though evidently but little invoked. That a domestic industry could bypass the President in a 516 (b) proceeding and obtain the assessment of such retaliatory duties, without his concurrence, is something that without prejudging would appear to be contrary to Congressional intent. It is of interest in that connection to note that prior to the 1930 Act, the term "countervailing duty" included not only duties to countervail bounties or grants, but also duties to retaliate against foreign countries when they assessed duties on American products although similar products, imported here, would be duty free. U. S. Tariff Commission, *Dictionary of Tariff Information* (1924), 205. The term also included duties to retaliate against discriminations against the United States, including export taxes that raised the cost of raw materials to American manufacturers. *Op. cit., supra.* In general, apparently any kind of retaliatory duty was a "countervailing duty."

All considered, it appears that countervailing duty is a penal exaction that the Congress did not intend the courts to impose, should the Treasury be recalcitrant, in a 516 (b) proceeding, and is not a "duty" within the meaning of that section.

Further, we note that Article III courts should abstain if possible from passing on controversies not essentially judicial in nature. *Cf., Glidden* v. *Zdanok*, 370 U.S. 530

(1962). In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative, or policy spheres. In *Glidden* v. *Zdanok, supra*, the review of Tariff Commission determinations under the Tariff Act of 1930, section 337, 19 U.S.C. § 1337, was held non-judicial business. Therefore, if doubtful, the question of jurisdiction here should be resolved against jurisdiction.

There are some standards and guidelines in the statutory language. The problem is with the undefined "indirect bounty". If it is direct, there is no problem, but foreign governments with plans to subsidize their exports are rarely that cooperative with the U. S. Treasury and courts. We all know that foreign exchange is desperately needed by most governments, and is always insufficient to their needs, and that hardly a one of them does not do all it can to encourage exports: this includes our own. Yet according to the court dicta quoted by the court below and appellee here, (dicta delivered in other than a 516 (b) context), any government measure to encourage exports in any substantial way would be an indirect bounty grant, and we should be assessing countervailing duties against imports from all the countries of the world. We all know we do not, as a practical matter. We pick and choose one apparent indirect bounty for this type of retaliation, and ignore another. The practical standard may well be whether the indirect bounty seems reasonable or unreasonable in the circumstances.

In this case there has been much theorizing by counsel about the assessment of stiff excises on the home production of an article with full exemption of the same article when exported. *E. g.*, IRC of 1954, sections 5001, 5247, as to distilled liquor. It is obvious that such a policy is a powerful incentive to the manufacturer to expand his foreign markets at the expense, if necessary, of those at home. Theoretical arguments why this is not an indirect bounty

fail to convince. It is urged that the excise, being really on consumption, is left to be assessed on the consumer in the importing country. That does not always occur: many of these tax-exempt exports find their way into tax-exempt markets. And so far as it it true, it only shows that this indirect bounty on exports is not an unreasonable one. We all know that this country does not assess countervailing duties on articles, stimulated on their way to our shores by such policies, because our government does it too.

Payment of tariff drawbacks on the content of imported material in exported manufactures is avowedly to stimulate exports. It supplies the manufacturer with his raw materials at a cheaper rate if, but only if he manufactures for export. The United States does that too, under Tariff Act of 1930, section 313, 19 U.S.C. § 1313, as amended. We do not think it too much to say that if a foreign country adopted a law exactly like section 313, as amended, and if a foreign product on which drawback was paid under that law came to the United States, and was protested under section 516 (b), the trial court would be compelled, by the logic of its opinion and the authorities it cites, to assess countervailing duties.

Nothing, at least in the short range, stimulates exports more than a devaluation of the currency. After devaluation, the exporter gets more home currency for each article he exports, and with it can purchase more goods and services at home, and he obtains these benefits largely at the expense of the producer for the home market who now gets paid in devalued currency. Yet we do not assess countervailing duties against countries because they devalue their currencies. Why not? The only valid reason is that these devaluations have been encouraged by our government, in the effort it has expended since Bretton Woods for a world-wide system of freely convertible currencies.

The Congress is, of course, well aware of these problems, and it would seem it elects to rely on executive discretion to avoid making the United States ridiculous by penalizing imports from foreign countries which have taken reasonable action, action our own government takes or counsels. Countervailing duties are strong medicine, well calculated to arouse violent resentment in countries whose trade practices are branded by the court as unethical. In what has been hitherto the regular practice of the Treasury Department making the decision to assess countervailing duties, the decisions, not necessarily partisan political, but political in a broad sense, legislative, or of a policy nature, can be made by an agency that is equipped and staffed to make them. There can be no doubt that the Secretary is under a legal duty to assess countervailing duties if he sees a bounty or grant being paid, but we think he does and must exercise some discretion in defining what acts of foreign governments confer bounties or grants, when the case is doubtful. We think, too, that the question whether an indirect bounty or grant is paid does not lend itself to a legal answer without the help of other disciplines. Courts that appeared to deal with the issue as purely legal, hitherto have had the benefit and help of Treasury expertise, since the issue has always come up under section 514, on an importer's protest of a Treasury action. Courts, reviewing the Treasury decision, need not redo the whole thing but could concentrate on the aspects susceptible of judicial resolution.

Thus the true Congressional intent, with respect to section 303, we believe contemplates some moderate degree of executive discretion in defining what sort of foreign governmental actions constitute indirect bounties or grants. An alleged indirect bounty or grant reasonably not seen as such by the executive is a case outside the contemplation of Congress. Instances of cases outside the scheme and purpose of Congress but within the literal language of

Federal statutes, or vice versa, are not uncommon and courts are required to deal with them: *e.g., Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 459 (1892); *Helvering* v. *New York Trust Co.,* 311 U.S. 504, 510-11 (1934); *Select Tire Salvage Co.* v. *United States,* 181 Ct. Cl. 695, 386 F. 2d 1008 (1967). A classic case in this court is *Procter & Gamble Mfg. Co.* v. *United States,* 19 CCPA 415, TD 45578 (1932), *cert. denied,* 287 U.S. 629, in which it was held, because the statutory scheme as a whole so required, that whale oil produced on the high seas was "imported from a foreign country."

It seems to us to be thus outside the contemplation of Congress, therefore, that anyone should bypass the executive branch in this class of case, by invoking 516 (b) procedure as was done here. In the generations of those who wrote sections 303 and 516 (b), no one seems to have thought of doing it. It had to wait until those who had any personal contact with these Congressional actions had gone to their rewards. We think the fit of 303 and 516 (b) is not so close as to show by themselves that in framing either, the other was in contemplation, and legislative history does not help. The dealing with contervailing duties in the General Agreement on Tariffs and Trade, Par. 4 of Article VI, 61 Stat. A 11 (1947) seems to reflect a belief on the part of Treasury in 1947 that it could veto an assessment of countervailing duties if it chose, and Congress has not since enacted anything to contradict that assumption.

We have considered the amendments the Congress has made to the Tariff Act sections here construed in *The Cupstoms Court Act of 1970,* P. L. 91-271, 84 Stat. 274, Approved June 2, 1970, although they come too late to affect the jurisdiction of the Customs Court over the instant protest. We observe that despite some language changes, the distinction we consider so significant still obtains be-

tween the review of "all charges or exactions of whatever character" on an importer's pro st, and review only of decisions relating to appraisement or classification or rate of duty in the case of the American Manuafacturer's Protest. The amendment in section 209 to the latter provison is stated by the House Committee not to have a substantive effect on the rights of the parties and to be intended only to consolidate appraisal and classification procedures. *U. S. Code Cong. & Adm. News,* 91st Cong., 2d Sess. 1856, 1885. Therefore, if a refusal to assess a penal or retaliatory special duty was not protestable previously under section 516 (b), it still is not.

It may be asked, if our interpretation of section 516 (b) is correct, does it leave the American Manufacturer entirely remediless even in case of an arbitrary and capricious refusal by Treasury to take appropriate action under the countervailing duty law? It is difficult to answer the question without deciding in dictum cases not before us, but a few observations will be made. The Second Circuit, in *J. C. Penney Company Inc.* v. *United States,* — F. 2d —, (decided March 1, 1971), has considered the new statute and reaffirmed holdings under the old, that the regular Federal courts will not interfere in customs cases reviewable in the Customs Court, because an importer desires to tailor a remedy more satisfactory to him than the Customs Court affords. A case of an American Manufacturer having no remedy at all in the Customs Court is greatly different. It is anomalous for anyone but the Government and the taxpayer to have a litigable interest in the assessment of a tax. However, the Congress has recognized the strong economic interest of domestic industry in the maintenance of adequate protective duties, and has fashioned a special remedy in limited circumstances. It is candidly not coextensive with the importer's protest in significant respects, for example, in being denied retroactive effect. It has been held to be "the grant of an extraordinary privilege which

must be strictly construed against the grantee." *The Chronite Co., Inc.* v. *United States*, 38 Cust. Ct. 76, 83 C.D. 1847, 150 F. Supp. 754 (1957, per Lawrence, J.). The Congress may well have intended the scope of section 516 (b) to be all the scope to litigate the domestic industry should be allowed to have. Of course, any customs exaction benefits the domestic industry to the extent it hinders the importer and weakens him financially and as a competitor. The need of the domestic industry for full enforcement of regular duties, however, might have appeared to Congress much greater than in the case of penal or retaliatory exactions. The former may be the basis on which capital is invested and production planned. No one would depend on the continuance of an exaction, the very purpose of which is to end the practice that called it into being. Thus it may be that any decision limiting 516 (b) may correspondingly limit the access of a complaining domestic industry to any kind of court relief. On the other hand, the modern tendency to fashion a remedy for any injury is a strong one, and it could be the regular courts would take jurisdiction in cases outside section 516 (b), where the domestic industry showed clear illegality and substantial injury. Such a proceeding would not be a *de novo* determination like the one the court below made here, but would, we think, be more in the nature of a review of the administrative decision, which would be overturned only if found arbitrary, capricious, or not founded on substantial evidence. A court considering the fashioning of such relief would have to consider its need in light of judicial remedies, and also such extra-judicial ones as the domestic industry might have, in resort to the Congress or to the Tariff Commission. We do not undertake to predict the answer.

It follows that the Customs Court erred in holding that it had jurisdiction of this case. Its decision and judgment are *reversed*.

REVERSED.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

October Term, 1970

Customs Appeal Nos. 5392-5393

THE UNITED STATES (RALPH VALLS, Party-in-Interest),
Appellants,
v.
HAMMOND LEAD PRODUCTS, INC., *Appellee.*

April 22, 1971

ALMOND, Judge, dissenting, with whom BALDWIN, J., joins.

With deference, I am unable to agree with the conclusion of the majority that the Customs Court lacked jurisdiction in the present matter. I would not only affirm the decision of the court below on the jurisdiction issue but also on the merits of the controversy.

Section 516(b), unambiguous in its terms, confers permission on an American manufacturer, producer, or wholesaler to protest a decision of the Secretary of the Treasury as to the classification or rate of duty imposed upon imported merchandise of a class or kind manufactured, produced or sold at wholesale by him. Therefore, if the present protest involves either the classification of the imported merchandise or the rate of duty with respect thereto, the Customs Court was invested with jurisdiction to entertain the instant action.

I think it clear that the protest in issue was directed towards the classification and/or rate of duty as those terms are employed in section 516(b). These statutory terms were defined in *Bradford Co.* v. *American Lithographic Co.*, 12 Ct. Cust. Appls. 318, T.D. 40318 (1924), where an American manufacturer, pursuant to section 516(b) of the Tariff Act of 1922, protested the failure of the Secretary of the Treasury to impose an additional duty equal to ten percent of the appraised value of the article because the merchandise was not marked, branded or labeled so as to indicate

the country of origin as required by section 304(a), Tariff Act of 1922, predecessor of section 304(a), Tariff Act of 1930.[1] The appeals court affirmed the holding of the Board of General Appraisers that:

> * * * the determination by the collector that the merchandise was, or was not, lawfully marked, as required by section 304(a), supra, involved classification of the merchandise, and that the additional duty of 10 per cent of the appraised value of merchandise classified as not legally marked, provided for in section 304(a), is a rate of duty within the meaning of the provisions of section 516(b) of the act of 1922, granting to an American manufacturer, producer, or wholesaler, of the class or kind of the imported merchandise, the right to protest the classification of merchandise and the rate of duty assessed by the collector * * *. [12 Ct. Cust. Appls. at 320-321.]

The appellant in *Bradford* contended that the provisions of section 304(a) do not involve classification of merchandise and an assessment of a rate of duty, and therefore the right extended to an American manufacturer by section 516(b) did not apply, and, accordingly, the Board of General Appraisers was without jurisdiction. The appellate court, however, stated:

> Classification of imported merchandise is the process or act of grouping or arranging merchandise into classes; it is a process which may be based upon the use to which the article has been dedicated, its commercial designation, its similarity to other merchandise, the condition in which it is imported, and other equally important considerations, the purpose of which is to determine what provisions of the tariff laws are applicable thereto.

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[1] As far as the issue here is concerned, section 516(b) of the Tariff Act of 1922 was essentially the same as section 516(b) of the Tariff Act of 1930.

As stated, classification is the process of determining "what provisions of the tariff law are applicable" to the importation. Assimilating *Bradford* to the instant situation, I think it clear that in both the American manufacturer was protesting the failure of the Secretary of the Treasury to apply the provisions of the statute and, thus, in each instance the "classification" of the imported merchandise was involved. In *Bradford,* the complaint involved improper marking under section 304(a) resulting in failure to impose the additional duty demanded for improperly marked goods. Here, appellee's complaint is directed at the failure of the Secretary of the Treasury to find that the litharge was the recipient of a bounty or grant under section 303, Tariff Act of 1930. Both in *Bradford* and here the seeking of judicial review was predicated on the finding of the Secretary that the relevant imported merchandise was not within a particular provision of the tariff laws which called for imposition of additional duties.

It is also my opinion that the additional duty prescribed by section 303, equal "to the net amount of such bounty or grant," is a rate of duty envisioned within the meaning of section 516(b). In *Bradford,* which, as has been seen, relates to additional duty of 10 percent of the appraised value of goods improperly marked under section 304(a), the appeals court stated:

> It is a rate of duty to be levied upon such merchandise as is classified by the collector as not marked in conformity with the mandate of the law.
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> • • • • • • • • • •
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> We think that a proper interpretation of the phrase, "rate of duty," as it is used in section 516(b), supra, means the amount of duty assessed against imported merchandise, resulting in the first instance, from the classification thereof. No other fair conclusion can be reached, we think, without a strained interpretation of the provisions of the section, expressive of the legis-

lative intent as it plainly appears therein, that is, to extend to the American manufacturer, producer, or wholesaler the right to protest a classification of imported merchandise of a class and kind manufactured, produced, or sold at wholesale by him, and the rate of duty assessed thereon, if in his opinion such classification is wrong and the rate of duty assessed improper, because of his interest and concern in preventing unlawful competition in the markets of the United States by foreign producers of foreign products, resulting in injury to his business.

I am not persuaded of error in the decision of the Customs Court on the jurisdictional issue and would conclude with it that:

> *Bradford* • • • is determinative of the jurisdictional issue here. Section 303, like section 304, requires the imposition of an added duty, added upon the existing statutory duty, should a specific condition exist. In section 304, this condition is the failure to properly mark the imported goods with the country of origin; in section 303 this condition includes the bestowal of a bounty or grant by a foreign government. One teaching of *Bradford* is that the determination by the Secretary of the existence of such a condition is "classification" within the meaning of section 516(b).
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> • • • In short, just as the additional duty of 10 percent of the appraised value of merchandise classified as not legally marked, as required by section 304(a), is a "rate of duty" within the meaning of section 516(b), so an additional duty equal to the net amount of a bounty or grant, as required by section 303, is a "rate of duty" within the meaning of section 516(b). Thus, the "rate of duty" within the meaning of section 516(b) is not delimited to the statutory duty being assessed on the imported merchandise; rather, the imposition of an additional duty under section 303 is as much a statutory duty as the 1.25 cents per pound con-

tained in item 473.52 of the tariff schedules. This is to say that if the existence of a bounty or grant is shown, then the mandate to levy the appropriate countervailing duty possesses the same statutory sancitity as the requirement of imposing 1.25 cents per pound under item 473.52.

The majority attempts to distinguish *Bradford* "on the hypothesis that the ten percent marking duty there involved was not regarded as penal." I see no such distinction between the provisions of section 304 (the one involved in *Bradford*) and section 303 (the one involved here). They are either both "penal" or not, and I do not see how one could be found "penal" and the other one found "not penal." Nor do I think that a distinction can be drawn from the fact that the "duty under section 304 for not marking relates to a physical characteristic of the merchandise, observable on its examination by Customs officers." Whether the particular statutory provision involved relates to the physical examination of the merchandise or not has nothing to do with whether said statutory provision is concerned with the determination of the "classification" or "rate of duty."

It seems clear to me that the majority has in effect concluded that the decision in *Bradford* was wrong. I cannot agree with the reasoning expressed by the majority in reaching such a conclusion and in limiting the applicability of section 516(b). The limitations imposed by the majority are, in by opinion, contrary to the decision in *Bradford* and to the explicit meaning of 516(b). The majority opinion suggests that American manufacturers should not bypass the U. S. Treasury by invoking 516(b) procedure, as distinguished from the procedure of section 514. I do not see how it can be said that the Executive branch is being bypassed in either case. If an importer may protest the decision of the Secretary of the Treasury finding a bounty or grant, why shouldn't an American manufacturer be permitted to protest the decision of the Secretary of the Treas-

ury finding no bounty or grant? In neither case are the protesting parties bypassing the U. S. Treasury. They are merely protesting a decision of the Secretary of the Treasury as they are clearly permitted to do under either section 514 or 516, depending on whether it is a protest by an importer or by an American manufacturer. Nor do I think that the slight language differences between sections 514 and 516 support the majority reasoning in this regard. We have previously held that "an American manufacturer, upon compliance with the provisions of * * * section 516(b), might protest the rate of duty assessed against importations to the same extent, so far as judicial review is concerned, as an importer might do under the provision of section 514, providing for protests by importers against decisions of the collector." *Feltex Corp.* v. *Dutchess Hat Works,* 21 CCPA 463, 472, T.D. 46957 (1934). To me section 516(b) is clear in conferring jurisdiction upon the Customs Court in the instant matter.

Having concluded that the Customs Court had jurisdiction, I would also affirm that court's decision on the merits of the controversy. I think the Customs Court was correct in finding a bounty or grant from the facts adduced in the present case. In fact, I am persuaded that such a conclusion is impelled by the definitions of bounty and grant expounded by the Supreme Court in *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), *aff'd* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), and *Downs* v. *United States,* 187 U.S. 496 (1903), *aff'g* 113 F. 144 (4th Cir. 1902) and by the facts involved in those cases. Since the majority found it unnecessary to discuss the issue on the merits because of its disposition of the jurisdiction issue, I likewise feel no need to consider it further except to add that the Customs Court's findings in that regard are supported by substantial evidence and are not clearly contrary to the weight of the evidence. Suffice it to say that I think there is persuasive legal precedent requiring an affirmance of the decision of the Customs Court as to both jurisdiction and the merits. I would, therefore, affirm.

APPENDIX B

HAMMOND LEAD PRODUCTS, INC.

v.

UNITED STATES (RALPH VALLS, Party-in-Interest)

United States Customs Court, First Division

Protest 67/77548-5928 against the decision of the district director of customs at the port of Laredo

[Judgment for plaintiff.]

Decided Nov 7 1969

Alvord & Alvord (Albert H. Greene of counsel) for the plaintiff.

William D. Ruckelshaus, Assistant Attorney General *(Brian S. Goldstein,* trial attorney), for the defendant.

Chapman, Di Salle and Friedman (Paul A. Lenzini of counsel) for the party-in-interest.

Before WATSON, MALETZ, and RE, Judges

MALETZ, Judge: The single question in this case—which comes before the court on an American manufacturer's protest—is whether the Mexican Government, directly or indirectly, bestows a bounty or grant, within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. § 1303), upon the manufacture, production or exportation of a lead oxide known as litharge. Section 303 provides:

> Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such

> article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated. The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

The case arises in the following way: In May 1967, plaintiff, a domestic manufacturer of litharge, filed a complaint with the Commissioner of Customs—pursuant to section 516(b) of the Tariff Act of 1930 (19 U.S.C. § 1516(b))—to the effect that litharge imported from Mexico was the recipient of a bounty or grant, thus requiring the imposition of an additional countervailing duty under section 303.[1] After consideration of the complaint, the Commissioner declined to impose countervailing duties. See T.D. 67-142 (1967). Plaintiff then filed timely notice that it desired to protest the decision. Subsequently it was

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[1] The litharge was classified by the Bureau of Customs under item 473.52 of the Tariff Schedules of the United States (19 U.S.C. § 1202) at 1.25 cents per pound, and this classification is undisputed. That item, it may be added, provides:

> Pigments (except pigments, in dry form, described in the foregoing provisions of this subpart):
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> • • • • • • •
>
> Containing lead:
>
> • • • • • • •
>
> 473.52 Litharge ..... 1.25¢ per lb.

notified by the District Director of Customs, Laredo, Texas, of the liquidation of an entry of litharge which was imported from Mexico on August 2, 1967. Plaintiff thereupon filed a protest with the District Director at Laredo, and a trial was later held in this court.[2]

We start with the facts as shown by the record. First, by way of background, it is to be noted that litharge is a lead oxide which is manufactured through the simple process of oxidizing refined (pig) lead.[3] The finished product—litharge—contains 93 percent lead and 7 percent oxygen, and is primarily used in lead storage batteries.[4] It is also used in the chemical industry for products such as lead arsenates and lead stabilizers, and in the pigments industry for lead chromates, etc. There is a close relation-

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[2] Defendant and the party-in-interest (the importer) filed motions to dismiss the protest on the ground that the court lacked jurisdiction to consider a protest filed by an American manufacturer under section 516(b) challenging a determination by the Secretary of the Treasury that a foreign government did not pay or bestow a bounty or grant upon exportation. The court held that it had jurisdiction and denied the motions to dismiss. *Hammond Lead Products, Inc.* v. *United States,* 61 Cust. Ct. 137, C.D. 3552, 289 F. Supp. 533 (1968). In answering plaintiff's present brief, defendant again insists that this court lacks jurisdiction to resolve the controversy. The arguments it presents on this aspect are in essence repetitive of several arguments it had previously made in the original motion to dismiss. Having upon detailed consideration found each such argument without merit, we see no reason for departing from our prior holding. Nor do we find in point any of the cases now relied on by defendant here for the first time—i.e., *Waterman Steamship Corp.* v. *United States,* 30 CCPA 119, C.A.D. 223 (1942); *American Viking Corp. et al.* v. *United States,* 37 Cust. Ct. 237, C.D. 1830 (1956); *United States* v. *Tower & Sons,* 14 Ct. Cust. Appls. 421, T.D. 42058 (1927); and *H. K. Wheeler, Inc.* v. *United States,* 9 Cust. Ct. 30, C.D. 655 (1942).

[3] The terms "pig lead" and "refined lead" are used interchangeably. See I *Minerals Yearbook* (1954), p. 661.

[4] About half the weight of such a battery consists of litharge.

ship between the cost of refined lead and the price of litharge. Thus in the United States, during the past decade there has existed a spread of between 2¼ to 2½ cents between the cost of refined lead and the selling price of litharge. In January 1968, as an example, the cost of lead in the United States was 13½ cents per pound, and the selling price of domestic litharge was 16 cents per pound. Emphasizing the simplicity of manufacturing litharge is the fact that this 2½-cent differential includes the total cost of converting lead into litharge, packaging, sales, and overhead plus an element of profit to the manufacturer.

We consider now the laws of Mexico which, according to plaintiff, operate as a bounty upon the production and exportation of litharge. At the outset it is to be observed that on July 31, 1967, refined lead was subject by Mexico to an ad valorem export tax of 27.50 percent, based on an official valuation of 2.277 pesos per gross kilogram,[5] and on December 31, 1968, the tax was 20 percent based on a valuation of 2.9681 pesos per kilogram.[6] Conversion of the pesos to cents and the kilograms to pounds[8] shows that the export tax on refined lead was approximately 2.27 cents per pound on July 31, 1967, and 2.16 cents per pound on December 31, 1968.

There is another important aspect to the Mexican tax structure pertaining to refined lead. In Mexico there are

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[5] The Decree (Diario of December 31, 1957, established the 27.50 percent ad rate for refined lead. The rate was reduced to 20 percent by the Decree (Diario of August 26, 1967.

[6] These official valuations applied only to refined lead exported to the United States; a lower valuation existed for exports to countries other than the United States.

[7] From 1961 to August 1969 the par value of the peso was 12.49 pesos per U.S. dollar. See *International Financial Statistics*, International Monetary Fund, Vol. XXII, No. 8 (Aug. 1969).

[8] A kilogram is equal to 2.2046 pounds. See e.g., Webster's *New International Dictionary* (2d ed. unabridged, 1948).

only two producers of refined lead, both of whom have plants in Monterrey. Each month there is published in Mexico a weighted average price of all sales of refined lead by these companies in export markets worked back to an f.o.b. Monterrey basis. This weighted average monthly Monterrey price represents the average amount realized from sales of refined lead made abroad by the two Mexican producers *after deducting* any import duties paid to foreign countries, freight, insurance and other costs. However, this weighted Monterrey price *includes* the tax imposed by Mexico on the export of refined lead.[9] For the month of July 1967 the weighted average Monterrey price was 10.48 cents per pound, and for the month of December 1968 it was 10.3 cents per pound. By contrast, the selling price of refined lead produced in Mexico and sold to domestic consumers was 8.6 cents per pound in both July 1967 and December 1968. The reason why the cost of refined lead to the Mexican consumer is less than the realization from export sales of refined lead, worked back to a Monterrey basis, is that the Mexican Govesnment requires the two Mexican producers of refined lead to deduct the amount of the export tax from the Monterrey price when selling to domestic consumers.[10]

Refined lead, it may be added, is an internationally traded commodity which is sold at a price which reflects the

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[9] The Monterrey price is published in order to provide a basis upon which the two Mexican refining companies pay miners for the lead content of their ore after deducting a fee for the smelting and refining.

[10] The Mexican Government has agreed, however, that it is proper for the two producers of refined lead in Mexico, when selling to domestic consumers, to add back certain charges to cover interest for insurance on sales made with payment in 90 days, and to cover selling expenses and credit losses. For this reason, the difference between the Monterrey price and the domestic price of refined lead is not represented solely by the export tax on refined lead.

supply and demand of the world.[11] The international price of refined lead is quoted daily on the London metal exchange.[12] Further, the Monterrey price—which (as we have seen) includes the Mexican export tax on refined lead—approximates the world f.o.b. selling price of refined lead. For example, the average Monterrey price in July 1967 (as mentioned previously) was 10.48 cents per pound; the average quote on the London metal exchange for July 1967 was 83 pounds, 18 shillings and 5 cents per ton of 2,240 pounds,[13] or 10.44 cents per pound. Since the Monterrey price approximately equals the international price of refined lead, and since the Monterrey price includes the Mexican export tax, it is evident that the Mexican export tax results in raising the cost of Mexican refined lead to the international price of that commodity. However, since the export tax on refined lead is deducted from the Monterrey price to establish the price to the Mexican consumer, the result is that the Mexican consumer purchases refined lead well below the international price.

We turn next to the Mexican taxing system on exportation of lead manufactures. Prior to 1954, litharge and the other manufactures of lead were subject to ad valorem export taxes. However, by the *Diario Official* of May 22, 1954, lead oxides, lead wire up to 5 millimeters diameter,

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[11] See e.g., *The London Metal Exchange,* Economic Intelligence Unit Ltd. (1958); 1969 *Commodity Year Book,* Commodity Research Bureau, pp. 202-26; Vols. I-II *Minerals Yearbook* (1967), pp. 647-75.

[12] Ibid. The price on the London metal exchange is an f.o.b. country-oforigin quote and thus is below the New York price which reflects the price of refined lead actually imported into the United States—which price has absorbed all the attendant costs of exportation. See U. S. Tariff Commission, *Trade Agreement Between the United States and Mexico* (1943), pp. 5556.

[13] *Engineering and Mining Journal,* August 1967. In July 1967 the par value of the pound was equal to $2.784. See *International Fund Statistics,* op. cit. *supra* at note 7.

lead sheets and plates up to 4 millimeters thickness, and lead pipe up to 40 millimeters of outside diameter (provided the thickness of the wall be up to 5 millimeters) were exempted from export taxes. But beginning on December 31, 1957, a different tariff classification system was utilized. On that date, by a decree published in the *Diario Official*, an export tax was reimposed on all these lead manufactures, except lead oxides and lead wire up to 5 millimeters diameter. Subsequently, an export tax was levied on the latter commodity by the *Diario Official* of February 12, 1958. Hence as of February 1958, the lead oxides were the only simple lead manufactured products which were exempt from export taxes. The rate of export tax in Mexico as of July 1, 1967 and December 31, 1968 on these manufactures of lead was, as follows:

Commodity	Rate	Ad Valorem Export Tax Rate
Lead rolled bars	7/ 1/67	25%
	12/31/68	25%
Lead wire up to 5 millimeters diameter	7/ 1/67	27.50%
	12/31/68	27.50%
Lead wire over 5 and up to 10 milimeters diameter	7/ 1/67	27.50%
	12/31/68	27.50%
Lead slabs or sheets up to 4 millimeters thick	7/ 1/67	23%
	12/31/68	23%
Lead plates over 4 millimeters thick	7/ 1/67	25%
	12/31/68	25%
Lead pipes up to 40 millimeters diameter, provided wall thickness up to 5 millimeters	7/ 1/67	14%
	12/31/68	14%
Lead pipes, not specified	7/ 1/67	25%
	12/31/68	25%
Yellow lead oxide (litharge); red lead oxide	7/ 1/67	Exempt
	12/31/67	Exempt

This brings us to the issue in the case—whether the Mexican Government, through the foregoing tax system, bestows, directly or indirectly, a bounty or grant upon the manufacture, production, or exportation of litharge within the meaning of section 303 of the Tariff Act of 1930, so as to require the imposition of an additional countervailing duty equal to the net amount of such bounty or grant.[14]

Countervailing duty legislation originated in the United States with the Tariff Act of 1890 which provided for the imposition on all sugar above number 16 Dutch standard in color—i.e., all refined sugar—of a duty of one-tenth of one cent per pound, in addition to the ordinary duty, when exported from any country which paid, directly or indirectly, a higher bounty on the exportation of sugar than on raw sugars of a lower saccharine content. 26 Stat. 584. In the Tariff Act of 1894, there was substituted a provision for the application of an additional duty of one-tenth of one cent per pound on all imports of sugar from countries which granted direct or indirect bounties thereon. 28 Stat. 521.

Section 5 of the Tariff Act of 1897, 30 Stat. 205, expanded the coverage of countervailing duties to all imports, dutiable under that act, which received a bounty or *grant* upon exportation.[15] This provision was retained in the Tariff Acts of 1909 and 1913. 36 Stat. 85; 38 Stat. 193-94.

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[14] The theory underlying countervailing duties was explained by the Tariff Commission, as follows: "When export bounties * * * either direct or indirect, are paid upon goods, such bounties neutralize more or less the duties that may be charged upon their importation into other countries and the protection thereby accorded. To reestablish the original amount of protection, the importing country may provide that for articles upon which export bounties are paid a protective surtax shall be charged. Such a surtax is known as a countervailing duty." U. S. Tariff Commission, *Dictionary of Tariff Information* (1924), p. 205.

[15] The addition of the word "grant" was recognized as "significant of a purpose to extend the latitude of the provision." *Nicholas & Co.* v. *United States*, 7 Ct. Cust. Appls. 97, 104, T.D. 36426 (1916), *aff'd* 249 U.S. 34 (1919).

Section 303 of the Tariff Act of 1922, 42 Stat. 935-36, enlarged the scope of countervailing duty protection from any bounty or grant upon exportation to any bounty or grant upon manufacture or production or export. The present provision, section 303 of the Tariff Act of 1930, is substantially the same as the 1922 act.

Several cases have dealt with the meaning and scope of the words "bounty" and "grant" as used in the countervailing duty provision. For example, *United States* v. *Hills Bros. Co.*, 107 Fed. 107 (2d Cir., 1901), involved provisions of Dutch law under which Holland gave a bounty for the production of sugar to be deducted from the excise thereon. However, such excise was remitted on exportation. The court held that the practical effect of the Dutch law was to make the remission of the excise tax from the standpoint of other countries a bounty on exportation. So far as a foreign country was concerned, the court pointed out, the result of the system was no different from what it would be had it provided that all sugar producers were to receive a bounty paid in cash from the government. "Those who export their sugar may keep this bounty, those who do not export it must forthwith return it to the government." Id. at 109.

Downs v. *United States,* 187 U. S. 496 (1903), concerned the laws of Russia which imposed a tax on all sugar produced but remitted the tax upon all sugar exported. An additional provision allowed the Russian exporter of sugar to obtain from the government a certificate solely because of such exportation, which certificate was salable and had an actual value in the open market. The Court affirmed the decision below and held (1) that "[w]hen a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation" (p. 515); and (2) that since under the laws of Russia the Russian exporter of sugar obtained from the government a certificate which had actual value,

the Russian government provided the Russian exporter, when he exported, a money reward or gratuity—which reward or gratuity was in effect a bounty on exportation. In the course of its opinion the Court dealt extensively with the word "bounty," stating (187 U.S. at 501-02):

> A bounty is defined by Webster as "a premium offered or given to induce men to enlist into the public service; or to encourage any branch of industry, as husbandry or manufactures." And by Bouvier, as "an additional benefit conferred upon or a compensation paid to a class of persons." In a conference of representatives of the principal European powers, specially convened at Brussels in 1898 for the purpose of considering the question of sugar bounties, the definition of bounty was examined by the conference sitting in committee, who made the following report:
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> "The conference, while reserving the question of mitigations and provisional disposition that may be authorized, if need be by reason of exceptional situations, is of opinion that bounties whose abolition is desirable, are understood to be all the advantages conceded to manufacturers and refiners by the fiscal legislation of the States, and that, directly or indirectly, are borne by the public treasury."
>
> "There should be classified as such, *notably:*
>
> "(a) The direct advantages granted in case of exportation.
>
> "(b) The direct advantages granted to production.
>
> "(c) *The total or partial exemptions from taxation granted to a portion of the manufactured products.*[16] [Emphasis added.]

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[16] The U. S. Tariff Commission's *Dictionary of Tariff Information* (1924) (likewise recognized that exemptions from tax may constitute an export bounty under certain circumstances. Thus the *Dictionary* pointed out that in the seventeenth and eighteenth

"(d) The indirect advantages growing out of surplus or allowance in manufacturing effected beyond the legal estimates.

"(e) The profit that may be derived from an excessive drawback."

In the decision below—*Downs* v. *United States,* 113 Fed. 144 (4th Cir., 1902), which was affirmed by the Supreme Court—the Fourth Circuit stated (pp. 147-48):

"* * * The word 'grant' is more comprehensive in meaning than the term 'bounty.' It implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character, upon a corporation, person, or class of persons. * * *"

"These cases are cited for the purpose of illustrating the broad and comprehensive meaning of 'grant', which differs in many respects from 'bounty'. While it involves the idea of a favor or benefit conferred by the government, sometimes of an exclusive character, it does not necessarily embrace the act of appropriating or paying money out of the public treasury. Indeed, the word 'grant', in its broad signification, may

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centuries, France gave what amounted to export bounties for silk culture and various industrial enterprises. "The bounties were usually granted to particular individuals rather than to industries in general. *They took various forms, such as freedom from taxes,* the bestowal of gifts, annual pensions, loans without interest, etc." [Emphasis added.] Id. at 76. The *Dictionary* also pointed out that in the nineteenth century indirect forms of bounties were found in certain exemptions or reductions of duties granted to new enterprises. Id. at 77. The *Dictionary* further observed that Haiti, among other countries, granted indirect export bounties "in the form of concessions to stimulate the development of the country's agricultural resources, *such concessions occasionally calling for full or partial exemption from Federal taxes.*" [Emphasis added.] Id. at 78. The *Dictionary of Tariff Information* is relevant, of course, in considering the legislative history of the Tariff Act of 1930. E.g., *R D Manufacturing Corp.* v. *United States,* 62 Cust. Ct. 421, 429, C.D. 3792, 298 F. Supp. 1192, 1198 (1969).

well include the remission of a tax already levied and assessed by the authority of government. It has been held that * * * actions of debt may be maintained for the collection of taxes. * * * There would seem to be no difference between the remission of a tax, and the resulting cancellation of the debt due the government, and a case where the tax may have been actually collected and paid into the treasury and then refunded and repaid by authority of law. * * * "

Another leading case is *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919), which involved the question as to whether British law covering the export of spirits constituted a bounty or grant. Under British law a duty was levied upon every gallon of spirits of a certain strength which was distilled within the United Kingdom or which, having been distilled therein, was in the stock or possession of any distiller in any duty-free warehouse and which, after a specified date, was taken out for consumption within the United Kingdom. British law further provided for payment to any distiller of an allowance of three pence per gallon upon the exportation thereof from a duty-free warehouse or upon the deposit of such spirits in a customs warehouse. Provision was also made for payment of five pence per gallon to a rectifier for spirits that the rectifier deposited in a customs warehouse. The Court affirmed the decision of the Court of Customs Appeals and held that notwithstanding the fact that such allowances may have been intended merely as compensation to distillers and rectifiers for costs due to British excise regulations, they were, as applied to export, governmental payments—"grants"—made only upon exportation which, by lessening the burden of British taxation, enabled the spirits to be sold more cheaply in the United States rather than in the United Kingdom. Pertinent are the following comments of the Court:

* * * There is paid to an exporter of spirits from the United Kingdom the sum of three or five pence a

gallon, as the case may be, and the instant conclusion is that the sale of spirits to other countries is relieved from a burden that their sale in the United Kingdom must bear. There is a benefit, therefore, in exportation, an inducement to seek the foreign market. And thus it would seem, if we regarded the substance of things, that the condition of the application of * * * [the countervailing duty provision] obtains. [p. 37]

* * * * * * * *

* * * The statute was addressed to a condition and its words must be considered as intending to define it, and all of them—"grant" as well as "bounty"—must be given effect. If the word "bounty" has a limited sense, the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise" a countervailing duty is required * * *. [p. 39]

In the decision below in *Nicholas & Co.* v. *United States*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916)—which was affirmed by the Supreme Court—the court made the following germane remarks (pp. 106-07),

There is nothing obscure, abstruse, mystic, or even ambiguous about this language, which has been, as to the particular words, a part of all our tariff acts from 1897 to and including the present act. * * * Its plain, explicit and unequivocal purpose is: Whenever a foreign power or dependency or any political subdivision of a government shall give any aid or advantage to exporters of goods imported into this country therefrom whereby they may be sold for less in competition with our domestic goods to that extent by this paragraph the duties fixed in the schedule of the act are

increased. It was a *result* Congress was seeking to equalize regardless of whatever name or in whatever manner or form or for whatever purpose it was done. The statute interprets itself as a member of an act calculated to maintain an accorded protection, incidental or otherwise, as against payments or grants of any kind by foreign powers, *resulting* in an equalization thereof to any extent directly or indirectly. * * *

* * * * * * *

The fact that the payment made by the foreign government was estimated or calculated upon a certain basis or in consideration of extra burdens imposed by domestic excise laws, or for any other reason of domestic government or policy commending itself to the wisdom of Parliament, is not controlling with our courts. The sole inquiry is, do the results of such acts stimulate exportation or give a special advantage by affording aid from the public treasury whereby such goods may when exported be sold in competition with ours for less? * * *

* * * * * * *

* * * If it be true that the excise system delineated intentionally or accidentally results in "an advantage to exporters of spirits to this country from the United Kingdom of Great Britain, which directly or indirectly is borne by the public treasury," or affords "a premium in like manner given or paid to encourage any branch of industry or manufacturers," likewise exporting, such falls within this paragraph. * * * The courts are concerned with results and not intentions.

In light of what has been said, we must conclude that the Mexican system of taxation on refined lead and lead manufactures constitutes a bounty or grant on the exportation of litharge. In the first place, while refined lead is taxed upon exportation, there is no equivalent tax when refined lead is sold for consumption in Mexico. This is because the

export tax on refined lead is deducted from the Monterrey price in establishing the price to the Mexican consumer. Thus Mexican fiscal policy enables the Mexican consumer of refined lead to procure the metal well below the international price of that commodity. When it is considered further (i) that the Mexican litharge producer is such a consumer; (ii) that refined lead is the primary material in litharge; and (iii) that the cost of refined lead represents the predominant cost of producing litharge, there can be no doubt that Mexican fiscal policy furnishes an advantage to Mexican producers of litharge.[17] In *Downs* v. *United States, supra,* 187 U.S. at 513, the Supreme Court stated that "if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported." In the present case, the tax situation in Mexico is the same except for direction. All refined lead exported is subject to tax; all refined lead sold domestically is free of such tax. This is equivalent to a situation where all refined lead produced was subject to a tax, and upon the domestic sale such tax was actually repaid or remitted.

Further, as stated before, litharge is a simple manufactured product. In addition to the fact that its predominant cost of production is the cost of refined lead, the record shows that the ultimate selling price of litharge is inextricably linked to the price of refined lead. However, there are other lead products which possess these same characteristics. Lead rolled bars, lead wire, lead slabs or sheets, lead plates and lead pipe are all simple manufactures of lead, the weight of which consists primarily of lead, and the price of which it tied to the price of lead.

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[17] The comments here and hereafter with reference to the exemption of litharge from the Mexican export tax apply equally, of course, to the other lead oxides which have similarly been exempt from export duty.

However, litharge is exempt of taxes upon exportation, while these other simple lead manufactures must (as set out previously) bear an export tax. This preferential export tax structure results in the fact that litharge may be exported at a proportionately lower price than the other simple manufactured lead products such as bars, wires, sheets, plates and pipes. Such a tax structure affords an inducement to export litharge—which is not similarly provided to the producers of these other simple manufactured lead products. Comparison of the export statistics for the various lead products confirms this to be the case.

Exports from Mexico (Kilograms)

	Litharge	Lead Bullet Bars	Lead Wire	Lead Sinks or Sheets	Lead Pipes	Lead Pipes, Not Specified
1965	[illegible]	0	0	0	1,387,609	0
1966	[illegible]	36	51	42	15	44
1967	[illegible]	0	0	0	0	0

In short, the cumulative actions taken by the Mexican government under which (1) refined lead is subject to an export tax, (2) refined lead is sold domestically free of tax; (3) simple lead manufactures other than litharge are subject to export taxes, and (4) litharge is exempt from export taxes, have the necessary consequence of fostering and encouraging the exportation of litharge. Initially, the Mexican litharge manufacturer purchases his refined lead at a price that is nearly two cents below the international price of that commodity—this two-cent figure being composed of the export tax which is not paid by Mexican manufacturers. Thus, as earlier indicated, the litharge manufacturer in Mexico purchased refined lead for 8.6 cents per pound in [illegible] as compared to a world price of 10.44 cents per pound. In that same month the cost of refined lead in the United States was 14 cents per pound.

After converting the refined lead into litharge, the litharge may be exported free of duty. Accordingly, the 2-cent per pound advantage received by the litharge producer upon his purchase of refined lead in Mexico still accompanies the litharge upon export since, unlike the case of other lead manufactures, it has not been offset by any comparable export tax on litharge. See *Franklin Sugar Refining Co.* v. *United States,* 142 Fed. 376, 380-81 (E.D. Pa., 1906), *aff'd* 2 Ct. Cust. Appls. 116, T.D. 31659 (1911).

Against this background, we think it clear that the Mexican fiscal structure—which exempts from tax the domestic sale of refined lead and singles out litharge for exemption from any export tax—falls specifically within the criteria established by *Nicholas & Co.* v. *United States, supra,* 7 Ct. Cust. Appls. 97. For the facts that all refined lead is subject to a tax when sold domestically and that the litharge manufacturer who purchases such lead may, in contrast to other lead manufacturers, export his litharge duty free are concessions provided by the Mexican Government which "give * * * aid or advantage to exporters of * * * [litharge] imported into this country." *Nicholas & Co.* v. *United States, supra,* 7 Ct. Cust. Appls. at 106. See also *Nicholas & Co* v. *United States, supra,* 249 U. S. at 39 Indeed, when it is considered that Mexico taxes the exportation of all simple manufactures of lead save litharge, the result of its fiscal system is no different in substance from what it would be if Mexico provided that *all* such manufactures of lead were to be subject to an export tax with the proviso that a refund equal to the amount of the export tax would be paid by the Mexican Government upon all exportations of litharge. See *United States* v. *Hills Bros. Co.. supra,* 107 Fed. at 109. And it is immaterial that the Mexican fiscal system is based upon an exemption from tax rather than an appropriation of money out of the public treasury since the consequences are precisely the same. See *Downs* v. *United States, supra,* 113 Fed. at 147.

In the last analysis, the "sole inquiry"—as pointed out in *Nicholas & Co.* v. *United States, supra,* 7 Ct. Cust. Appls. at 107—is whether *the results* of the governmental acts "stimulate exportation * * * by affording aid from the public treasury whereby such goods may when exported be sold in competition with ours for less." The record here requires an affirmative response showing, as it does, that Mexican litharge is sold in the United States at a price well below that which can be quoted by domestic litharge producers in the United States. For example, in the summer of 1967, Mexican litharge was sold in the United States at approximately 14 cents per pound. On the same date, the domestic producer of litharge in the United States had to pay 14 cents per pound for refined lead, the primary raw material, and, thus, quoted a selling price for the fabricated product of about 16.5 cents per pound. This is not surprising since at the same time the domestic producer paid 14 cents for his refined lead, the Mexican producer, due to Mexican fiscal policy, was paying only 8.6 cents per pound and then exporting the litharge with an export tax exemption.

The record also shows that up to 1954—when litharge was subject to export taxes—litharge imports into the United States from Mexico never reached one million pounds in any year.[18] In 1954, the year litharge was exempted from the export tax, imports from Mexico jumped to 1,171,100 pounds. And since 1954, the amount of litharge imports from Mexico has increased at a significant rate. In 1956, imports from Mexico were up to 10,741,672 pounds; by 1959, the total had jumped to 22,245,418 pounds; in 1962, the amount had increased to 30,633,745 pounds; and in 1967, Mexican imports of litharge amounted to 48,408,865 pounds. Imports of litharge from all countries in 1967

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[18] For each of the calendar years 1951 through 1953, exports from Mexico to the United States were as follows: In 1951, 600,590 pounds; in 1952, 221,050 pounds; and in 1953, 86,210 pounds.

amounted to 49,264,739, thereby placing Mexico in the position in that year of being the source of over 98 percent of all litharge imports. These shipments are even more impressive when it is recognized that domestic litharge shipments in the United States in 1967 amounted to only 99,982 short tons, or 199,964,000 pounds. Thus, Mexican imports amounted to over 24 percent of total domestic shipments and comprised over 19 percent of the entire domestic market.

Nor is it coincidental that the large increase of Mexican litharge imports began in 1954 when Mexican litharge became exempt from export tax. Rather, there is a definite cause and effect relationship existing between the two events. First, the proximity of Mexico to the United States cannot account for the fact that Mexican imports amount to over 98 percent of total imports. Prior to 1954, Canada, with the same geographic advantage, generally exceeded Mexico in the amount of litharge exported to the United States.[19] Presently, Canadian exports of litharge into the United States are inconsequential.[20] Second, the record shows that Mexican litharge is equal in commercial quality to domestically manufactured litharge. Third, Mexican imports are not fulfilling demands of consumers in the United States which domestic producers are unable to meet. In this connection, testimony at trial shows that there is idle capacity available in the domestic litharge industry.

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[19] For example, in 1951 Canadian exports of litharge to the United States amounted to 2,949,950 pounds as compared with 600,590 pounds from Mexico. In 1952, Canada exported 1,020,650 pounds to the United States, while Mexico exported 221,050 pounds. In 1953, however, both countries exported only insubstantial amounts, with Canadian exports totaling 25,500 pounds, while Mexico exported 86,210 pounds.

[20] In 1965, for example, Canadian exports to the United States aggregated only 49,200 pounds. In 1966 and 1967, there were no exports to the United States of Canadian litharge.

Fourth (as set out above), Mexican litharge is sold in the United States at a price well below that which can be quoted by domestic litharge producers. Fifth, the president of the largest litharge producer in Mexico (who was called as a witness by the party-in-interest) indicated that the removal of the export tax on litharge in 1954 had an important bearing on the increase of exports of litharge to the United States in subsequent years. Finally, this witness stated that the Mexican litharge producers had established a self-imposed quota on the amount of litharge which could be exported from Mexico to the United States, and that the purpose for this limitation on exports was to prevent the market in the United States from being upset. The fact of this self-imposed quota system makes certain conclusions inescapable. It demonstrates for one thing that the Mexican litharge industry is capable of acquiring a greater portion of the domestic market in the United States at any time, but is fearful of doing so. (Otherwise there would be no reason for the quota.) The cause of this fear can be only the possibility of remedial action taken in the United States to offset the non-competitive relationship which Mexican litharge bears to domestic litharge.

Party-in-interest argues that section 317(e) of the Tariff Act of 1922, now section 338(e) of the Tariff Act of 1930 (19 U.S.C. § 1338(e)), evidences that export duties are outside the scope of section 303 of the Tariff Act of 1930. We can not agree. Section 317(e) (presently section 338(e)) provides in part:

> Whenever the President shall find as a fact that any foreign country imposes any unequal imposition or discrimination as aforesaid upon the commerce of the United States, or that any benefits accrue or are likely to accrue *to any industry in any foreign country by reason of any such imposition or discrimination imposed by any foreign country other than the foreign country in which such industry is located,* and when-

> ever the President shall determine that any new or additional rate or rates of duty or any prohibition hereinbefore provided for do not effectively remove such imposition or discrimination and that any benefits from any such imposition or discrimination accrue or are likely to accrue to any industry in any foreign country, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty * * *. [Emphasis added.]

Section 317(e) was directed primarily at a situation where colonies of colonial powers were furnishing raw materials to their mother countries at an advantage over third countries, by means of various forms of discrimination.[21] As a result, the Tariff Commission recommended that statutory authority be made available which would be aimed at offsetting such advantages.[22] Thus, section 317(e) allows the President to impose additional or new duties on imports of countries which receive benefits from another country resulting from that country's discrimination against the United States. The section, in particular, provides for additional duties when an industry in a foreign country receives an advantage imposed *"by any foreign country other than the foreign country in which such industry is located."* Section 303, on the other hand, calls for a countervailing duty whenever a country bestows a bounty or grant upon the production or export of *"any article or merchandise manufactured or produced in such country* * * *." Therefore, section 317(e) was enacted not because export duties were outside the scope of section 303, as plaintiff contends, but because the advantage colonial powers were receiving in regard to raw materials could

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[21] See U. S. Tariff Commission, *Colonial Tariff Policies* (1922).

[22] U. S. Tariff Commission, *Sixth Annual Report* (1922), p. 6.

not be remedied under section 303 inasmuch as the advantage originated in a country other than the country of production, and thus was outside the procedural criteria of section 303.

The protest is sustained. Judgment will be entered directing the district director of customs at Laredo, Texas, to reliquidate the entry by adding an additional duty equal to the amount, as found by the Secretary of the Treasury, of the bounty or grant bestowed by the Mexican Government upon the exportation of litharge.

HERBERT N. MALETZ
J.

Concurring:

J.L.W.
J.
EDR
J.

Entry 1057 retained for appeal time.

APPENDIX C

HAMMOND LEAD PRODUCTS, INC.

v.

UNITED STATES (RALPH VALLS, Party-in-Interest)

United States Customs Court, First Division

Protest 67/77548-5928 against the decision of the district director of customs at the port of Laredo

[Motions to dismiss denied.]

Dated Sep 11 1968

Alvord and Alvord (*Albert H. Greene* of counsel) for the plaintiff.

Edwin L. Weisl, Jr., Assistant Attorney General (*Brian S. Goldstein*, trial attorney), for the defendant.

Chapman, Di Salle and Friedman (*Paul A. Lenzini* of counsel) for the party-in-interest.

Before WATSON and MALETZ, Judges

MALETZ, Judge: This is a protest by an American manufacturer under section 516(b) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(b)). The protest challenges the finding of the Secretary of the Treasury that no bounty or grant, as defined in section 303 of the Tariff Act of 1930 (19 U.S.C. § 1303), had been paid or bestowed by the Mexican Government upon certain litharge[1] that was manufactured in Mexico and imported into the United States. See T.D. 67-142 (1967). The litharge was classified by the collector under item 473.52 of the Tariff Schedules of the

[1] Litharge is a lead oxide which is used primarily in the battery industry.

United States at 1.25 cents per pound,[2] and this classification is undisputed. However, plaintiff claims in its protest that contrary to the finding of the Secretary, the Mexican Government does in fact bestow a bounty or grant upon the exportation of the litharge to the United States (allegedly in the estimated amount of three cents per pound) and that, consequently, an additional countervailing duty equal to the net amount of such bounty or grant is required to be paid under the authority of section 303 of the Tariff Act of 1930. Defendant and the party-in-interest (the importer) have filed motions to dismiss on the ground that this court lacks jurisdiction to consider a protest filed by an American manufacturer under section 516(b) of the act seeking review of a finding by the Secretary of the Treasury that a foreign government did not pay or bestow a bounty or grant on exportations which would require the imposition of a countervailing duty as provided for in section 303 of the act. For the reasons set out below, we hold that the court has jurisdiction to review the Secretary's determination and therefore deny the motions to dismiss.

As to the statutes involved, section 516(b) of the Tariff Act of 1930, as amended, provides as follows:

> (b) The Secretary of the Treasury shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification of, and the rate of duty, if any, imposed upon, designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the proper rate

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[2] Item 473.52 of the Tariff Schedules provides:

> Pigments (except pigments, in dry form, described in the foregoing provisions of this subpart):
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> • • • • • • •
>
> Containing lead:
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> • • • • • • •
>
> Item 473.52 Litharge ..... 1.25¢ per lb.

of duty is not being assessed, he may file a complaint with the Secretary, setting forth a description of the merchandise, the classification, and the rate or rates of duty he believes proper, and the reasons for his belief. If the Secretary decides that the classification of, or rate of duty assessed upon, the merchandise is not correct, he shall notify the collectors as to the proper classification and rate of duty and shall so inform the complainant, and such rate of duty shall be assessed upon all such merchandise entered for consumption or withdrawn from warehouse for consumption after thirty days after the date such notice to the collectors is published in the weekly Treasury Decisions. If the Secretary decides that the classification and rate of duty are correct, he shall so inform the complainant. If dissatisfied with the decision of the Secretary, the complainant may file with the Secretary, not later than thirty day after the date of such decision notice that he desires to protest the classification of, or rate of duty assessed upon, the merchandise. Upon receipt of such notice from the complainant, the Secretary shall cause publication to be made of his decision as to the proper classification and rate of duty and of the complainant's desire to protest, and shall thereafter furnish the complainant with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at the port of entry designated by the complainant in his notice of desire to protest, as will enable the complainant to protest the classification of, or rate of duty imposed upon, such merchandise in the liquidation of such an entry at such port. The Secretary shall direct the collector at such port to notify such complainant immediately when the first of such entries is liquidated. Within thirty days after the date of mailing to the complainant of notice of such liquidation, the complainant may file with the collector at such port a protest in writing setting forth a de-

scription of the merchandise and the classification and rate of duty he believes proper. Notwithstanding such protest is filed, merchandise of the character covered by the published decision of the Secretary, when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, rendered under the provisions of subsection (c) of this section, not in harmony with the published decision of the Secretary, shall be classified and the entries liquidated in accordance with such decision of the Secretary, and, except as otherwise provided in this chapter, the liquidations of such entries shall be final and conclusive upon all parties. If the protest of the complainant is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of such court decision, shall be subject to classification and assessment of duty in accordance with the final judicial decision on the complainant's protest, and the liquidation of entries covering such merchandise so entered or withdrawn shall be suspended until final disposition is made of such protest, whereupon such entries shall be liquidated, or if necessary, reliquidated in accordance with such final decision.

Section 303 of the Tariff Act of 1930 reads:

Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export

of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this chapter, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this chapter, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated. The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

We start with several introductory considerations. First, it is now settled that section 516(b) permits American manufacturers to protest only the *classification* of imported merchandise and the *rate of duty* assessed thereon; that section—unlike section 514 which is applicable to importers' protests[3]—does not authorize the American manufacturer to protest against the *amount of duty* assessed. *E. C.*

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[3] Section 514 of the Tariff Act of 1930, as amended, specifically provides that an importer may protest not only as to the rate, but also as to the amount, of duties assessed against his merchandise, and further gives him the right to contest the legality of all orders and findings entering into the fixing of such rate and amount of duties.

Miller Cotter Lumber Co. v. United States, 24 CCPA 272, T.D. 49701 (1936). Thus the court pointed out in *E. I. Miller Co.* (24 CCPA at 280):

> • • • The Congress did not extend to the American manufacturer the right to protest against the *amount* of duty assessed against imported merchandise, but limited the right of protest to the classification thereof, and the rate or rates of duty assessed thereon. It did not authorize the American manufacturer to protest against the collector's decision as to the weights, measures, and quantities of imported merchandise, nor to challenge the correctness of the collector's orders and findings upon the proper classification of such merchandise or the assessment of the proper rate or rates of duty thereon, depended upon such weights, measures, quantities, and orders and findings of the collector. To recapitulate, the Congress assumed that, unless the classification of imported merchandise, and the rate or rates of duty at is assessed thereon, depended upon the orders and findings entering into the collector's decision, such orders and findings might safely be left to the customs officials, giving the importers only the right to challenge their correctness.
>
> Desiring however to give American manufacturers the right to aid in the interpretation and construction of the law and to give them full protection thereunder, the Congress did provide that such manufacturers might protest against the classification of imported merchandise and the rate or rates of duty assessed thereon by the collector. [Emphasis quoted.]

The second consideration is that where a classification or rate of duty question is involved, an American manufacturer has the privilege under section 516(b) of contesting the validity of any order or finding "to the same extent as he is entitled to judicial review is concerned, as an importer might do under the provisions of section 514, pro-

viding for protests by importers against decisions of the collector." *Feltex Corp.* v. *Dutchess Hat Works,* 21 CCPA 463, 472, T.D. 46957 (1934). See also H. Rept. No. 7, 71st Cong. 1st Sess. (1929), pp. 179-180. Lastly, it is established that this court has jurisdiction, upon a section 514 protest by an importer to review the Secretary's finding under section 303 as to whether a foreign government pays a bounty or grant on exportations to the United States. *Downs* v. *United States,* 113 Fed. 144, 146 (4th Cir., 1902), *aff'd* 187 U.S. 496 (1903). See also *e.g. United States* v. *Hills Bros. Co.,* 107 Fed. 107 (2d Cir., 1901); *Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916); *F. W. Woolworth Co.* v. *United States,* 28 CCPA 239, C.A.D. 151 (1940); *V. Mueller & Co.* v. *United States,* 28 CCPA 249, 257, C.A.D. 152 (1940); *Energetic Worsted Corp.* v. *United States,* 53 CCPA 36, C.A.D. 874 (1966); *Bullocks, Inc.* v. *United States,* 6 Cust. Ct. 110, C.D. 441 (1941).[4]

The problem against this background is to determine whether this court has similar jurisdiction to review the Secretary's finding as to the applicability of section 303—where the issue comes up through protest by an American manufacturer under section 516(b). From what has been said, the answer obviously depends on whether the Secretary's finding—in this case, that the litharge is not within the confines of section 303 so that additional duty is therefore not required—involves a classification or rate of duty question on the one hand, or an amount of duty question, on the other. As we have seen, should the Secretary's finding involve classification or rate of duty (as plaintiff argues), it is judicially reviewable by this court on an American manufacturer's protest under section 516(b); but

[4] Where the Secretary determines that a bounty or grant has been bestowed, several cases indicate that his finding as to its amount is final and conclusive and not reviewable by the courts. *E.g. Downs* v. *United States, supra,* 113 Fed. at 146; *V. Mueller & Co.* v. *United States, supra,* 28 CCPA at 258.

should his finding involve amount of duty (as defendant and the party-in-interest maintain), judicial review is foreclosed.[5]

Bearing directly on this problem is *Bradford Co.* and *U. S.* v. *American Lithographic Co.*, 12 Ct. Cust. Appls. 318, T.D. 40318 (1924). In *Bradford,* an American manufacturer through section 516(b) of the Tariff Act of 1922,[6] protested the failure of the Secretary of the Treasury to impose an additional duty equal to 10 percent of the appraised value of the article, because such merchandise was not marked, stamped, branded or labeled, so as to indicate the country of origin as required by

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[5] Section 516(b) is the only vehicle by which an American manufacturer may obtain judicial review of a customs decision by the government involving a rate of duty (or classification) question. For the appeals court has held that section 514 of the Tariff Act of 1930 does not permit an importer to protest a rate of duty as being too low and thus that an American manufacturer may not, by importing goods, challenge the correctness of a lower rate than that which is claimed to be proper. *George S. Fletcher* v. *United States,* 25 CCPA 195, T.D. 49294 (1937). The authorization in section 516(b) for American manufacturers to protest against the classification and/or rate of duty assessed against imported merchandise was the progeny of the Tariff Act of 1922. See *e.g.* H. Rept. No. 248, 67th Cong. 1st Sess. (1921), p. 26. The tariff acts prior to the Tariff Act of 1913—*e.g.* the Tariff Act of 1909—were judicially construed as permitting an importer to contest by protest a rate of duty as being too low—which meant that an American manufacturer could obtain relief simply by importing the merchandise in question, and then protesting that the rate of duty was too low. *United States* v. *Schwartz & Co.,* 3 Ct. Cust. Appls. 24, T.D. 32315 (1912). The *Schwartz* "decision did not meet with favor" and the right to protest a rate of duty as being too low was abrogated by the Tariff Act of 1913 which limited the protest to a rate of duty which was claimed to be too high. *Louisiana* v. *McAdoo,* 234 U.S. 627, 632 (1914).

[6] So far as the present issue is concerned, section 516(b) of the Tariff Act of 1922 was essentially similar to section 516(b) of the Tariff Act of 1930.

section 304(a) of the Tariff Act of 1922—the predecessor to section 304 of the Tariff Act of 1930. The appeals court affirmed the holding of the Board of General Appraisers that "the determination by the collector that the merchandise was, or was not, lawfully marked, as required by section 304 (a), *supra,* involved classification of the merchandise, and that the additional duty of 10 per cent of the appraised value of merchandise classified as not legally marked, provided for in section 304 (a), is a rate of duty within the meaning of the provisions of section 516 (b) of the act of 1922, granting to an American manufacturer, producer, or wholesaler, of the class or kind of the imported merchandise, the right to protest the classification of merchandise and the rate of duty assessed by the collector; * * *." 12 Ct. Cust. Appls. at 320-21.

In *Bradford,* the appellant contended that the provisions of section 304 (a) do not involve classification of merchandise and an assessment of a rate of duty, and therefore the right extended an American manufacturer by section 516 (b) did not apply and, accordingly, the Board of General Appraisers was without jurisdiction.[7]

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[7] More specifically, the appellant contended that the "additional duty" imposed by section 304(a) was a penalty and therefore not within the scope of section 516(b); and that the word "duty" in the phrase "rate of duty" in section 516(b) should not be construed to mean "additional duty." Brief, pp. 9-18. The appellant further argued that the case did not involve "classification" on the asserted grounds (i) that classification does not depend on the state of the article, but rather depends upon the method of production and the nature of the product and is controlled by the schedules in the Dutiable List, and (ii) that it is the inherent nature of the merchandise and not any extraneous incident that must be determined in reaching the correct classification. Brief, pp. 18-24. Finally appellant contended that the term "rate of duty" means the rate of customs tax payable on imported merchandise under the schedules of Title I (the Dutiable List) and is not applicable to a fixed ten percent "additional duty" for failure to mark. Brief, pp. 24-27.

The appellate court responded to this argument by holding (12 Ct. Cust. Appls. at 323) that:

> Classification of imported merchandise is the process or act of grouping, or arranging merchandise into classes; it is a process which may be based upon the use to which the article has been dedicated, its commercial designation, its similarity to other merchandise, the condition in which it is imported, and other equally important considerations, the purpose of which is to determine what provisions of the tariff laws are applicable thereto.
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> * * * * * * *
>
> It must be determined as to what group or class it belongs. Whether it is lawfully marked or unlawfully marked requires investigation, examination, and intelligent consideration and determination; the resultant is classification of the merchandise, * * *.[8]

In regard to the provisions of section 304 (a) which levies an additional duty of 10 percent of the appraised value, the court commented that "It is a rate of duty to be levied upon such merchandise as is classified by the collector as not marked in conformity with the mandate of the law. * * * We think that a proper interpretation of the phrase, 'rate of duty,' as it is used in section 516 (b), *supra,* means the amount of duty assessed against imported merchandise, resulting in the first instance, from the classification thereof." 12 Ct. Cust. Appls. at 323.

> * * * No other fair conclusion [the court added] can be reached, we think, without a strained interpre-

[8] Defendant insists that the issue in the present case does not involve a "classification" question since the Secretary's finding here—unlike the situation in *Bradford*—is in no way dependent upon the physical condition of the merchandise at the time of importation. But as the above quotation from *Bradford* makes crystal clear, it is scarcely a prerequisite to constitute "classification" that there be involved the physical condition of merchandise at the time of importation.

> tation of the provisions of the section, expressive of the legislative intent as it plainly appears therein, that is, to extend to the American manufacturer, producer, or wholesaler the right to protest a classification of imported merchandise of the class and kind manufactured, produced, or sold at wholesale by him, and the rate of duty assessed thereon, if in his opinion such classification is wrong and the rate of duty assessed improper, because of his interest and concern in preventing unlawful competition in the markets of the United States by foreign producers of foreign products, resulting in injury to his business. Congress could have had no other purpose in view, and to defeat that purpose by a strained construction of the statute is not a proper judicial function. [12 Ct. Cust. Appls. at 323-324.]

Bradford, we conclude, is determinative of the jurisdictional issue here. Section 303, like section 304, requires the imposition of an added duty, added upon the existing statutory duty, should a specific condition exist. In section 304, this condition is the failure to properly mark the imported goods with the country of origin; in section 303 this condition includes the bestowal of a bounty or grant by a foreign government. One teaching of *Bradford* is that the determination by the Secretary of the existence of such a condition is "classification" within the meaning of section 516(b).

It is quite true that in *Bradford* section 304(a) of the Tariff Act of 1922 imposed an additional duty "of 10 per centum of the appraised value thereof," while here section 303 of the Tariff Act calls for an additional duty "equal to the net amount of such bounty or grant." But the fact that the latter amount must be administratively translated into numerical terms is not a viable distinction. For "[t]he finding of that amount is a ministerial or administrative duty which the statute, for obvious reasons,

imposes upon the Secretary of the Treasury. After he makes such finding and advises collectors therof, the latter automatically assess the amount as a countervailing duty, just as they assess regular duties in conformity with the rates fixed by statute." *V. Mueller & Co., supra,* 28 CCPA at 258. In short, just as the additional duty of 10 percent of the appraised value of merchandise classified as not legally marked, as required by section 304(a), is a "rate of duty" within the meaning of section 516(b), so an additional duty equal to the net amount of a bounty or grant, as required by section 303, is a "rate of duty" within the meaning of section 516(b).[9] Thus, the "rate of duty" within the meaning of section 516(b) is not delimited to the statutory duty being assessed on the imported merchandise; rather, the imposition of an additional duty under section 303 is as much a statutory duty as the 1.25 cents per pound contained in Item 473.52 of the Tariff Schedules. This is to say that if the existence of a bounty or grant is shown, then the mandate to levy the appropriate countervailing duty possesses the same statutory sancity as the requirement of imposing 1.25 cents per pound under Item 473.52.

Another analogous decision is *North American Cement Corp.* v. *Anderson,* 284 F.2d 591 (D.C. Cir., 1960). In that case, American cement manufacturers asked the Secretary of the Treasury to investigate whether cement imported from Norway was being sold in this country at less than its fair value. The Secretary found that the cement was not being sold at less than its fair value and, therefore, no dumping duty was imposed on importations of the merchandise as required by the Antidumping Act of 1921. Appellants then sought declaratory and injunctive relief

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[9] It is also worthy of mention that when the Secretary of the Treasury determines that the amount of a countervailing duty is to be increased or decreased, the new amount is referred to in the customs regulations as the "new *rate*" or "new *rates*." [Emphasis supplied.] See *e.g.* 19 CFR § 16.24(f), table (1968).

against the Secretary of the Treasury and the Commissioner of Customs. The appellate court affirmed the district court's action dismissing the complaint for lack of jurisdiction on the ground that the American manufacturers had an adequate remedy in the Customs Court by filing a protest under section 516(b) of the Tariff Act of 1930, as amended, and that the case was therefore governed by 28 U.S.C. § 1340 which excepts from the jurisdiction of the district court "matters within the jurisdiction of the Customs Court." The basis of the holding in *North American Cement,* in other words, was that section 516(b) permitted an American manufacturer to protest the failure of the Secretary of the Treasury to find that cement imported from Norway was being sold in this country at less than its fair value, and the resulting failure to enforce a special dumping duty as required by the Antidumping Act.

In sum, we think it clear (i) that the determination of the existence of a bounty or grant, the purpose of which is to determine whether section 303 is applicable to the present importation is "classification" as defined in *Bradford;* and (ii) that an additional duty equal to the net amount of such bounty or grant is a duty to be assessed as a result of such classification, and is thus a "rate of duty" within the meaning of section 516(b). Moreover, considering that classification and rate of duty questions are thus involved, and that section 514 is the appropriate means for an *importer* to protest the imposition of a countervailing duty, an American manufacturer necessarily possesses the correlative right—under the principle set forth in *Feltex*—to protest via section 516(b) the lack of imposition of a countervailing duty. *Feltex Corp.* v. *Dutchess Hat Works, supra,* 21 CCPA at 472.

Defendant and the party-in-interest argue, however, (as did the appellant in *Bradford,* see note 7 *supra*) that the

sole "rate of duty" for litharge is specified in item 473.52 of the Tariff Schedules (at the rate of 1.25 cents per pound), and that the additional duty sought by plaintiff pursuant to section 303 is not part of the rate of duty for litharge but an addition thereto. In these circumstances, they place major reliance on *E. C. Miller Cedar Lumber Co.* v. *United States, supra,* 24 CCPA 273 (1936), and contend that plaintiff's protest, though it purports to challenge the "rate of duty" at which litharge is to be assessed, merely complains of the total *amount of duty* assessed against the imported merchandise so that the court lacks jurisdiction. There is a twofold difficulty with this contention, however. In the first place, the selfsame argument was (as previously discussed) expressly rejected by *Bradford.* Second, reliance on *E. C. Miller* is misplaced. In *E. C. Miller,* an American manufacturer filed a protest under section 516(b) claiming that the ascertainment of the quantity of lumber upon which duty should have been assessed was made upon a wrong basis of measurement. The merchandise involved was sawed lumber less than one inch thick, and the claim was that board feet measure should have been ascertained by measuring the merchandise as though it were one inch thick throughout and not by a formula laid down in various Treasury rulings. (The protest raised no question as to the classification or rate of duty assessed.) This court dismissed the protest for lack of jurisdiction on the basis that the only two grounds upon which an American manufacturer could protest were classification and rate of duty, and neither of those two actions were made an issue in the protest. *E. C. Miller Cedar Lumber Co.* v. *United States,* T.D. 48701 (1936). The appellate court affirmed the dismissal for lack of jurisdiction on the basis that an "amount of duty" question was the only question involved, and in so doing concluded that "rate of duty" within the meaning of section 516(b) was not equivalent to the total amount of duty assessed. *E. C. Miller Cedar Lumber Co.* v. *United States, supra,* 24 CCPA

273 (1936).[10] In determining what was meant by "amount of duty" as distinguished from "rate of duty," the court pointed out (as we have seen) that

> • • • It [516(b)] did not authorize the American manufacturer to protest against the collector's decision as to the weights, measures, and quantities of imported merchandise, nor to challenge the correctness of the collector's orders and findings, unless the proper classification of such merchandise, or the assessment of the proper rate or rates of duty thereon, depended upon such weights, measures, quantities, and orders and findings of the collector. [24 CCPA at 280.]

The court in *E. C. Miller* further clarified what was meant by "amount of duty" in the following terms:

> Of course, if the collector did use the wrong formulas in ascertaining "board measure," and used the rates of duty provided by statute on a less *quantum* of lumber than that contemplated by the statutes in question, it could be argued with some plausibility that the effect of his decision was to reduce the rates of duty provided therein. Such an argument could always be made where the collector assesses the correct rate of duty, but makes an error in determining the correct amount of imported merchandise and assesses duty on a less quantity than that imported. To illustrate: If, as a matter of fact, 100 bushels of wheat were imported into the United States, and duty thereon was $1 per bushel, and the collector concluded that there were but 90 bushels, and assessed that quantity at the statutory

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[10] In the course of its opinion, the court in *E. C. Miller* dealt extensively with and cited with approval, its earlier decision in *Bradford* but made it clear that the latter case was not in point since it involved a classification-rate of duty question rather than an amount of duty problem. 24 CCPA at 279. It may be added that Judge Hatfield wrote the opinion for the appellate court in both *Bradford* and *E. C. Miller*.

rate of $1 per bushel, he, in effect, reduced the rate of duty to 90 cents per bushel. [24 CCPA at 281.]

The dispute in *E. C. Miller* was thus centered on the quantum of lumber involved, and not on the rate of duty to be assessed, and hence is not in point here. For here, plaintiff's protest is lodged against (1) the claimed improper classification of litharge—*i.e.* that it is not within the provisions of section 303, and (2) against the rate of duty resulting from such a classification, a duty equal to the net amount of such bounty or grant. Plaintiff is not questioning the quantum of litharge and resulting amount of duty, as was the situation in *E. C. Miller*, nor the amount of bounty or grant. The existence of the bounty or grant, and not its amount, forms the essence of plaintiff's protest.

The following will clarify the matter further. In the typical case where import duties are imposed, the appropriate government official proceeds in three stages. Initially (after appraisal), he classifies the imported merchandise, and thus determines the applicable rates of duty imposed by statute. Secondly, he ascertains the quantum of merchandise being imported. Thirdly, he multiplies the rate of duty times the quantum of merchandise (also times the value where the duty is ad valorem), and the resulting product is the amount of duty to be collected. The court in *E. C. Miller* was making a distinction in reference to this three-stage process. It pointed out that a protest directed at the determination of the quantum of merchandise must necessarily affect the amount of duty ultimately to be paid. But such a protest is not directed at the first stage—determination of classification and resulting rate of duty—which forms the jurisdictional basis for protests under section 516(b).

The issuance of a countervailing duty under section 303 involves the same three-stage process. Initially, the classification must be made, *i.e.*, the payment or bestowal of a

bounty or grant, and then the section dictates the statutory rate of duty to be imposed. This rate of duty is defined as "an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed." It is precisely this classification and rate of duty to which the protest is directed. The second and third stages—the quantum of merchandise and resulting amount of duty—are (as pointed out previously) not involved in the present protest.

What this comes down to is that amount of duty refers to the total amount actually assesed on a single importation (which can be of no special interest to an American manufacturer), whereas classification and rate of duty refer to the standards of assessment of duty on all merchandise of the same class (which, of course, have the utmost significance to the American manufacturer).

The party-in-interest also relies on *Mills & Gibb* v. *United States*, 8 Ct. Cust. Appls. 31, T.D. 37164 (1917). In that case window curtains were entered at their invoice price, which valuation was advanced 20 percent by the local appraiser. On appeal for reappraisement the general appraiser found actual market value to be only 5 percent in excess of the invoice price and thus reduced the addition of the local appraiser. While the appeal for reappraisement was pending, other window curtains of the same character were entered by the same importer and in declaring the value of that merchandise upon entry, the importer added 20 percent to the invoice price, stating that this addition was made by them in order to meet the advances made by the local appraiser upon the former importations. The second importation was similarly appealed for reappraisement and was subsequently appraised at the invoice price plus 5 percent increase. Paragraph I of the Tariff Act of 1913 provided in part:

> • • • The duty shall not, however, be assumed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that

[illegible] the entered value in manner that the foreign market value and that the goods are so entered in order to meet objection of the appraiser in similar cases then pending or arising for reappraisement, and the importer's protection shall subsequently be sustained by a final decision on reappraisement, and it shall appear that the action of the importer on entry was taken in good faith after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his directions with a statement of his conclusions and his reasons therefor.

The importer claimed that the second importations fell within the foregoing statutory exception and that duty should be assessed upon the invoice price plus 5 percent, in accordance with the final reappraisement, notwithstanding that entry had been made at the invoice price plus 20 percent. Application to the Secretary for exercise of his authority to release the merchandise at less than the entered value was denied, however, on the ground that the importer's contentions had not been sustained on reappraisement. The collector accordingly assessed duty at the entered value of the second importations instead of its reappraised value and the importer protested. On appeal, the appellate court held that the action of the Secretary was not reviewable—its rationale being that that paragraph 7 of section 3 of the Tariff Act of 1913 sanctioned protests of an importer only upon decisions of the collector and in that case the collector had made no decison, and it had [illegible] no authority to make a decision. [illegible] This rationale is entirely in-

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[illegible] It is noteworthy to note that Congress evidenced displeasure with the narrow construction of Par. 7 of Section 3 and Par. I of Section 5 Tariff Act of 1913 which in effect denied the importer the right to protest the amount of duty to be assessed. Section 489, Tariff Act of 1930, entirely corrected this limiting feature on the importer's right to protest, providing in part, that:

"* * * [illegible] shall not however be assessed upon an amount less than the entered value except in a case where the im-

applicable to plaintiff's protest, since section 516(b) of the Tariff Act of 1930, does not limit the right of an American manufacturer to protest to only a decision of a collector. Section 516(b) sanctions protests whenever the American manufacturer is dissatisfied with the classification and rate of duty of designated merchandise, as determined by the Secretary of the Treasury.

The party-in-interest argues further that section 516(b) does not serve the function of bringing countervailing duty complaints to the attention of the Secretary of the Treasury—which argument seems to be based on the contention that section 516(b) is not consistent with the implementing regulations, 19 CFR § 16.24 (1968), promulgated by the Secretary under section 303. But jurisdiction over the present protest depends upon the Congressional remedy found in section 516(b), and not upon any regulations issued by the Secretary. Any language in the regulations contrary to or inconsistent with section 516(b) is, of course, meaningless as to the jurisdictional issue before the court. In actuality, however, there is no inconsistency in the procedure to be followed by the Secretary under section 516(b) where, after the complaint, he determines the classification or rate of duty upon the merchandise is not correct, and the procedure by which the Secretary issues a countervailing duty order under 19 CFR § 16.24(d) and (e). Under section 516(b) the action of the Secretary is initiated by a

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porter certifies at the time of entry that the entered value is higher than the value as defined in this Act, and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement or re-reappraisement, and the importer's contention in said pending cases shall subsequently be sustained, wholly or in part, by a final decision on reappraisement or re-reappraisement, and it shall appear that the action of the importer on entry was so taken in good faith, after due diligence and inquiry on his part, *and the collector shall liquidate the entry in accordance with the final appraisement.* [Emphasis supplied.]

decision on his part as to the validity of the protestant's claim in his complaint. In the case of countervailing duties, that decision is rendered in conformity with the procedure established in 19 CFR § 16.24. What this means is that in countervailing duty matters the procedure established in section 516(b) is initiated by the Secretary's decision rendered in conformity with 19 CFR § 16.24. Thus, the procedure outlined in 19 CFR § 16.24 is not inconsistent with, but rather is antecedent to, the procedure established in section 516(b).

Lastly, defendant asserts that an added reason for concluding that the court lacks jurisdiction is that since the Secretary has sole discretion to determine the *amount* of any bounty or grant, there is no judgment this court could enter in the event it determined that Mexico did in fact pay a bounty or grant. The assertion is without merit. Should the court determine that a bounty or grant was paid, then in accordance with the last sentence of section 516(b), it would direct the district director of customs to reliquidate the entry by adding an additional duty equal to the net amount of the bounty or grant, as found by the Secretary. "The finding of that amount" (as we have seen) "is a ministerial or administrative duty which the statute, for obvious reasons, imposes upon the Secretary of the Treasury. After he makes such finding and advises the * * * [district director] thereof, the latter automatically assess[es] the amount as a countervailing duty, just as * * * [he] assess[es] regular duties in conformity with the rates fixed by statute." *V. Mueller & Co., supra,* 28 CCPA at 258.

The motions to dismiss for lack of jurisdiction are denied.

HERBERT N. MALETZ
J.

Concurring:

J.L.W.
J.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 71-446

HAMMOND LEAD PRODUCTS, INC., *Petitioner,*

v.

THE UNITED STATES (Ralph Valls, Party-in-Interest), *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

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BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1970

No. 71-446

HAMMOND LEAD PRODUCTS, INC., *Petitioner,*

v.

THE UNITED STATES (Ralph Valls, Party-in-Interest), *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Customs and Patent Appeals (Pet. App. 1a-24a) is reported at 58 C.C.P.A. , C.A.D. 1017, 440 F.2d 1024. The opinions of the United States Customs Court, First Division, (Pet. App. 25a-66a) are reported at 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp. 460, and at 61 Cust. Ct. 137, C.D. 3552, 289 F. Supp. 533.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on April 22, 1971, and petition for rehearing was denied by that court on July 1, 1971. The petition for a writ of certiorari was filed September 28, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1256.

QUESTION PRESENTED

Whether the United States Customs Court is vested with jurisdiction under Section 516(b), Tariff Act of 1930, 19 U.S.C. § 1516(b), so as to permit direct review by an American manufacturer of a determination by the Secretary of the Treasury that a foreign government does not bestow a bounty or grant on exportation of merchandise within the meaning of Section 303, Tariff Act of 1930, 19 U.S.C. § 1303.

ARGUMENT

1. The Court of Customs and Patent Appeals correctly determined that an American manufacturer may invoke section 516(b) to seek direct review of a refusal by the Secretary of the Treasury to find that the laws of Mexico constitute a bounty or grant on exportation of certain merchandise within the meaning of section 303 of the Tariff Act of 1930. As originally enacted in the Tariff Act of 1922, section 516(b) represented a distinct innovation in administration of the customs laws. By that provision, Congress established a remedy in favor of the American manufacturer, producer or wholesaler to "protest the classification of, or rate of duty assessed upon" imported merchandise, if of a class or kind manufactured, produced or sold by him, in a proceeding designed to increase the amount of

duty imposed on such imported merchandise. The American manufacturers' right to protest is entirely governed and limited by the express provisions of section 516(b), and it has been uniformly held that section 516(b) is the grant of an extraordinary privilege which must be strictly construed against the grantee. E.g., *Zinberg* v. *United States,* 16 C.C.P.A. 268, T.D. 42870; *The Cronite Co.* v. *United States,* 38 Cust. Ct. 76, C.D. 1847; *E. C. Miller Cedar Lbr. Co.* v. *United States,* 69 Treas. Dec. 330, T.D. 48161, aff'd 24 C.C.P.A. 272, T.D. 48701. Since enactment by Congress in 1922 of the American manufacturers' protest this is the first reported instance of an attempt to utilize section 516(b) to review a refusal by the Secretary to assess additional duties under section 303. In light of the fact that for nearly fifty years no one has attempted such review, one is struck by petitioner's assertion as to importance of the question from the viewpoint of the ability of American industry to protect itself from unfair trade practices.

Against this background the court below determined that the action of the Secretary in determining that the law of Mexico did not give rise to a bounty or grant within the meaning of section 303 involved neither classification nor a question as to rate of duty. The Secretary's determination that no bounty exists in the instant case is in accord with Congressional intent under section 303 and accords also with unbroken administrative practice of over seventy years in excluding from the category of bounty or grant the remission of taxes directly related to an exported product.

The term "classification" and the words "rate of duty"are settled expressions in customs administration and in light thereof the decision of the court below is

plainly correct. In enacting tariff legislation, Congress forms classes of merchandise by grouping them together into schedules, paragraphs, sub-paragraphs, and sections. "Classification by the administrative officers consists of the determination, according to legal rules and standards, of the narrowest particular class or division or category thus prescribed into which the imported merchandise falls." *E. C. Miller Cedar Lbr. Co.* v. *United States,* supra at 333. The process of classification is based upon investigation and examination of the characteristics of merchandise and such examination must relate to the merchandise at time of importation. *United States* v. *Lo Curto & Funk,* 17 C.C.P.A. 342, T.D. 43777. Tariff classification is thus the process of associating the imported article with the duty-rate description in the customs laws which most properly applies to it. Tariff Classification Study, Submitting Report, 44 (U.S. Tariff Comm'n 1960). Under the customs laws the collector of customs (the administrative officer in charge of a customs collection district) is the classification officer.[1]

Contrary to petitioner's contention, the action of the Secretary of the Treasury in determining whether the laws of a foreign government constitute a bounty or grant within the meaning of section 303 is clearly not "classification." It is evident, as noted by the court below, that the process of classification involves the examination of physical attributes or qualities inherent in imported merchandise in order to ascertain

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[1] See Act of June 17, 1930, § 500(a)(4), 46 Stat. 729, as amended, 84 Stat. 283 (1970), 19 U.S.C. § 1500(b) (Supp. 1970) which sets forth the duty of the appraising officer to "describe the merchandise in order that the collector may determine the dutiable classification thereof."

the narrowest particular description in the customs laws for the purpose of assessing the rate of duty fixed by Congress. By contrast, countervailing duty determinations under section 303 are not dependent upon any attribute or quality of imported merchandise but rather upon whether foreign laws give rise to a bounty or grant upon exportation of merchandise. Moreover, the question whether foreign laws give rise to a bounty often is a matter of considerable complexity, the decision of which has been committed to the Secretary of the Treasury under section 303. It is distinctly denied to the collector.

Nor does the Secretary's determination under section 303 involve a question of "rate of duty." This term as used in section 516(b) has been defined by the predecessor court to the Court of Customs and Patent Appeals as "the amount of duty assessed against imported merchandise, *resulting in the first instance, from the classification thereof.*" *Bradford Co. and U.S.* v. *Amercan Lithographic Co.,* 12 Ct. Cust. Appls. 318, 323, T.D. 40318 (1924) (emphasis added); and see *E.C. Miller Cedar Lbr. Co.* v. *United States,* 24 C.C. P.A. 272 at 279. Countervailing duties under section 303 are not fixed by statute so as to be a "rate of duty" resulting from classification. Indeed, far from being a rate fixed by statute the declaration of amount of bounty pursuant to section 303 has been committed by Congress to the Secretary and it has been uniformly held that the Secretary's declaration of amount is conclusive and may not be inquired into by the courts. *Franklin Sugar Ref. Co.* v. *United States,* 1 Ct. Cust. Appls. 242, T.D. 31276; *Franklin Sugar Ref. Co.* v. *United States,* 178 Fed. 743 (C.C.E.D. Pa. 1910); *V. Mueller & Co.* v. *United States,* 28 C.C.P.A. 249, C.A.D. 152.

The court below also pointed to the considerable difference between the provisions of section 514 of the Tariff Act of 1930, granting rights to importers to protest decisions affecting imported merchandise, and the provisions of section 516 governing the American manufacturers' protest. While the latter provision allows protest solely on the question of classification or rate of duty, section 514 authorizes the filing of protest by an importer in connection with

> [A]ll decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury). . . . 19 U.S.C. § 1514.

In contrast to the more narrow provisions of section 516(b), the provisions of section 514 provide for review by importers in extremely broad terms, including review of "all exactions of whatever character within the jurisdiction of the Secretary." Quite plainly the importer's right of review and those of the American manufacturer have not been meted out by Congress in equal measure.[2]

Finally, section 516(b) itself removes any basis for petitioner's claim that it may directly review the Secretary's determination by protest. Section 516(b) and, indeed section 514, provide means of protesting actions of the *collector*. Under the scheme of

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[2] The importer's statutory remedy to protest illegal exactions on imported merchandise, as provided in the Act of June 20, 1864, Rev. Stats. §§ 2931, 2932, was in substitution for a common law remedy whose antecedents pre-dated the Republic. See *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 254-55 (1845) (dissenting opinion of Story, J.).

section 516(b), where the Secretary determines that an existing classification and rate of duty are correct, he so informs the complainant who, if dissatisfied with the Secretary's decision, may file notice that he desires to protest. Upon receipt of such notice from the complainant, the Secretary is required to furnish the complainant with such information as to entries and consignees of such merchandise "as will enable the complainant to protest the classification of, or rate of duty imposed upon, such merchandise in the liquidation of such an entry at such port." The collector at such port is directed to notify complainant when the first of such entries is liquidated and, within thirty days of such liquidation, the complainant may file with the collector at such port a protest in writing setting forth a description of the merchandise and the classification and rate of duty he believes proper. Putting to one side the fact that the "description of the merchandise" required to be filed with the collector has everything to do with ascertaining which duty-rate description of the tariff laws applies (classification) while having nothing to do with the section 303 question whether the laws of a foreign country give rise to a bounty, it is clear from the statutory scheme that the American manufacturers' protest is against the collector's liquidation. If otherwise, there would appear to be no reason for the necessity of filing a protest with the collector in connection with the liquidation of an actual entry.

In cases where the action of the collector depends upon the validity of the action of the Secretary of the Treasury, the latter's action may be reviewed by the Customs Court upon a timely protest. E.g., *Waterman Steamship Corp.* v. *United States,* 30 C.C.P.A. 119, 125,

C.A.D. 223. Thus, where an affirmative determination by the Secretary under the countervailing duty statute results in imposition of additional duties by the collector in obedience to the Secretary's instruction, validity of the Secretary's action under section 303 may be reviewed by timely protest under section 514. In the instant case, however, petitioner does not question the collector's decision as to classification or rate of duty but instead questions the determination by the Secretary of the Treasury refusing to find that the laws of Mexico give rise to a bounty. This is plainly an attempt to review an action the final determination of which has been conferred by Congress on the Secretary of the Treasury in section 303.

Indeed, even under the far broader provisions of section 514, the customs courts have uniformly held that the refusal of the Secretary to act is not reviewable upon an importer's protest. Importers have thus been denied review of the refusal by the Secretary to direct assessment of duty upon an amount less than the entered value of imported merchandise, *Kurz & Co.* v. *United States,* 13 Ct. Cust. Appls. 527, T.D. 41395; *Mills & Gibb* v. *United States,* 8 Ct. Cust. Appls. 31, T.D. 37164 and as well in cases involving refusal of the Secretary to remit or refund duties on ship's repairs caused by casualty at sea. *American Viking Corp.* v. *United States,* 37 Cust. Ct. 237, C.D. 1830; *Lykes Bros.* v. *United States,* 6 Cust. Ct. 467, C.D. 518; *Waterman Steamship Corp.* v. *United States,* 30 C.C.P.A. 119, C.A.D. 223; *Portland California Steamship Co.* v. *United States,* 13 Cust. Ct. 170, C.D. 889. The underlying rationale of these decisions, equally applicable in the instant case, is that Congress under the statutes in question vested in the Sec-

retary exclusive authority to direct assessment upon an amount less than the entered value of merchandise (or to remit or refund duties on ship's repairs by casualty at sea) and a refusal by him to do either is not reviewable upon protest of the collector's liquidation in such cases since the authority is vested in the Secretary, withheld from the collector, and does not enter affirmatively into the collector's assessment or become a part of it. *Mills & Gibb* v. *United States,* supra at 37-39.

2. Petitioner's claim that the decision below conflicts with *North American Cement Corp.* v. *Anderson,* 284 F.2d 591 (D.C. Cir. 1960), lacks validity for a number of reasons, the most prominent being that different questions were before the two courts. The court in *North American Cement* dealt with reviewability of antidumping findings by the Secretary, the instant case with findings concerning foreign bounties. While part of the analysis by the court below does appear to be irreconcilable with *North American Cement,* the holdings of the two cases are clearly distinguishable.[3]

Moreover, even could a conflict be said to exist, it does not have continuing vitality. Where necessary to decision in a case before it, any court may attempt to construe the jurisdictional boundaries of a sister court but it is the latter court whose decisions on its

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[3] It is submitted that the decision in *North American Cement* is not persuasive authority for the different proposition determined therein. In support of its determination that a remedy exists in the Customs Court to contest a refusal by the Secretary to find sales of imports at less than fair value, the court relied on two cases which involved regular rate of duty questions clearly cognizable by the Customs Court under section 516(b). No further authority or rationale was offered.

own jurisdiction control those litigating before it. This is particularly true in the area of customs litigation where a specialized tribunal has been established by Congress.

3. Petitioner's final contention, that *rationale* utilized by the court below conflicts with *analysis* of two Supreme Court decisions, has an ethereal quality difficult to grasp. Again, petitioner admittedly does not contend that there exists a conflict between decisions but rather with respect to certain language bearing upon the penal character of section 303. *Downs* v. *United States,* 187 U.S. 496 (1903) and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), involved situations where the Secretary had in fact imposed countervailing duties and the question decided by the court below was not present. Even so, petitioner points to no inconsistency in underlying rationales. That a countervailing duty when assessed is equal to the amount of bounty or grant as determined by the Secretary by no means prevents it from being penal in nature. The countervailing duty statute is designed not to raise revenue but to serve as a preventive of what is considered unfair competition in international trade. Nor does it lack penal character because no willful or malicious conduct need be shown, a fact which has been held to enhance penal character. *Helwig* v. *United States,* 188 U.S. 605 (1903); *Cotonificio Bustese, S.A.* v. *Morgenthau,* 74 App. D.C. 13, 121 F.2d 884 (1941); 20 Ops. Att'y Gen. 660 (1893). The foregoing decisions, cited by the court below, dealt specifically with penal character of additional duties prescribed by Congress. *Downs* and *Nicholas,* supra, did not nor do they contain inconsistent language.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-446

HAMMOND LEAD PRODUCTS, INC., PETITIONER

v.

UNITED STATES (RALPH VALLS, PARTY-IN-INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an American manufacturer of litharge, filed this suit in the United States Customs Court as a protest to the refusal of the Secretary of the Treasury to impose countervailing duties on imported litharge. Section 303 of the Tariff Act of 1930 (19 U.S.C. 1303) requires the secretary to impose a countervailing duty on imports whenever any country gives a "bounty or grant" to the export, equal to such bounty or grant. The Secretary found that the Mexican Government had not given a "bounty or grant" on certain litharge manufactured in Mexico and imported into the United States.

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Litharge, a compound of 93 percent lead and 7 percent oxygen by weight, is manufactured by the process of oxidizing refined lead. As a lead oxide, it was at the time of importation exempt from the Mexican export tax of 14 to 27.5 percent *ad valorem* that was imposed by Mexico on other simple lead manufactured products, *i.e.*, lead bars, wire, sheets, plates and pipes (R. 195–196).[1] In addition, it was not subject to Mexico's export tax of 2.27 cents per pound on refined lead (R. 192–193).

Section 516(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1516(b)) permits the Customs Court to entertain protests to the "classification" or the "rate of duty" on imported merchandise. Respondents moved in the United States Customs Court to dismiss the protest for lack of jurisdiction, claiming that the Secretary's countervailing duty decision involved neither of those categories. The Customs Court denied the motion (Pet. App. C, pp. 47a–66a).

Thereafter a trial was held on the merits. At its conclusion, the Customs Court (Pet. App. B, pp. 25a–46a) found (a) that the export tax on refined lead gave Mexican lead consumers, including litharge producers, an advantage over foreign consumers of refined lead; and (b) that the export tax on simple lead products, except lead oxides, gave the litharge producers in Mexico an advantage over Mexican producers of other lead products (Pet. App. B, pp. 38a–41a). As a result of these advantages, it concluded that

[1] "R." references are to the record of proceedings in the Customs Court.

(*id.* at p. 42a), "Mexican litharge is sold in the United States at a price well below that which can be quoted by domestic litharge producers in the United States." Finding further "a definite cause and effect relationship" between the export tax exemption and the "large increase of Mexican litharge" importations into the United States (*id.* at p. 43a), the court sustained the protest, holding that "the Mexican system of taxation on refined lead and lead manufacturers constitutes a bounty or grant on the exportation of litharge" (*id.* at p. 38a).

An appeal was taken to the United States Court of Customs and Patent Appeals; the United States sought review only on the merits, whereas Ralph Valls, the importer of the litharge involved here (R. 15), also contested the jurisdictional question. A divided court reversed solely on the ground that the Customs Court lacked jurisdiction under Section 516(b) (Pet. App. A, pp. 1a–24a). The majority held that the Secretary's decision respecting countervailing duties involved neither the "classification" of litharge, nor the "rate of duty" thereon, within the meaning of the statute. It concluded (*id.* at p. 12a): "it appears that countervailing duty is a penal exaction that the Congress did not intend the courts to impose, should the Treasury be recalcitrant, in a 516(b) proceeding, and is not a 'duty' within the meaning of that section."

1. The only issue presented in the petition is whether Section 516(b) confers jurisdiction upon the Customs Court to entertain a protest by an American manufacturer challenging the Secretary of the Treas-

ury's denial of countervailing duties. The government took no position on that question in the Court of Customs and Patent Appeals, and we similarly take no position here.

We do point out, however, that the question is a narrow one turning solely on the construction of that particular Section of the Tariff Act. It has been resolved by the court specifically established to decide customs disputes. Congress can readily amend Section 516(b) if it is dissatisfied with the holding below. There thus seems to be no occasion for review by this Court.

2. Moreover, the Secretary's refusal to impose countervailing duties on the ground that Mexico does not confer any "bounty or grant" within the meaning of Section 303, was, we submit, correct. Unlike the bounty or grant involved in *Nicholas and Co.* v. *United States*, 249 U.S. 34, the Mexican tax system provides no "inducement to seek the foreign market." 249 U.S. at 37. That is, Mexico's tax system provides no incentive for Mexican producers to export their litharge rather than to sell it in Mexico. In addition, the fact that Mexico does not tax its litharge exports does not give Mexican litharge any artificial advantage over litharge produced in the United States, in contrast to the type of artificial advantage presented in *Downs* v. *United States*, 187 U.S. 496. In these circumstances, the Secretary was fully justified in not imposing any countervailing duty upon Mexican litharge.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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